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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272.

NORWEGIAN NITROGEN PRODUCTS COMPANY, INC., *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

IN ERROR TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF FOR PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF FOR THE PETITIONER.

(Supplemental to the Petition and Brief for the Writ.)

STATEMENT OF THE CASE.

This case is here on Certiorari to the United States Court of Customs and Patent Appeals to review a judgment which affirmed a judgment of the United States Customs Court construing the rights accorded by statute to interested

parties, appearing at a public "hearing" by the United States Tariff Commission, "to be present, to produce evidence and to be heard," and the appropriate remedy for review of the denial of such statutory rights, under the flexible tariff as provided in Sec. 315 (a), Tariff Act of 1922 (42 Stats. 942; U. S. Code Title 19, Sec. 156). These provisions are essentially the same as provided by the current flexible tariff re-enacted as Sec. 336, Tariff Act of 1930 (46 Stats. 701; U. S. C. Tit. 19, Sec. 1336, 1931 Supp.) Both are here considered in connection with Sec. 708, Title VII, of the Revenue Act of 1916 (39 Stat. 798; U. S. C. Title 19, Sec. 1335, 1931 Supp.) The pertinent parts are as follows:

The applicable statutes (Act of 1922) are (42 Stat. 941):

> "SEC. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same.
>
> * * * * * * * * *
>
> "(c) * * * Investigations to assist the President in ascertaining differences in costs of production under this section *shall be made by the United States Tariff Commission*, and *no proclamation shall be issued under this section until such investigation shall have been made*. The commission shall give *reasonable public notice* of its *hearings* and shall give *reasonable opportunity to parties interested to be present, to*

produce evidence, and to be heard. The commission is authorized to adopt such reasonable *procedure, rules,* and *regulations* as it may deem necessary. (Italics ours.)
* * * * * * * * * * ".

That Sec. 708 of Title VII of the Revenue Act of 1916 (39 Stats. 798) provides:

> "Sec. 708. It shall be unlawful for any *member* of the United States Tariff Commission, or for any *employee, agent,* or *clerk* of said Commission, or any other officer or employee of the United States, to divulge or to make known *in any manner whatever not provided for by law,* to any person, *the trade secrets or processes* of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by said Commission, or by order of any member thereof. Any offense against the provisions of this section shall be made a misdemeanor and be punished by a fine not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment. * * *." (Italics ours.)

Bearing in mind that the foregoing are member provisions of the same act, to wit, the Tariff Act of 1922, it will be instructive of the purpose of Congress to read the several provisions together so as to give some separate and distinct force and effect to each thereof in accordance with the well-known rule of statutory construction to that effect.

It should be borne in mind that Section 708 of the Revenue Act of 1916 was enacted by Congress long before the Commission was invested with the power and directed to hold "hearings" as provided by Section 315 (e), Tariff Act of 1922. It will be noted particularly that said Section 708 is confined to *members* of the United States Tariff Commission, *employees, agents* and *officers* thereof. It does not extend in language to the *Commission as such.* That this limitation of the provisions of Section 708 was advisedly

so enacted is shown by the internal construction of the *various* provisions *in pari materia.* Thus Section 701 and Section 706 of the Act of 1916 are extended to "the Commission." Likewise in Section 708 Congress speaks of "an investigation conducted by said Commission or by order of said Commission." At the time of this amendment, therefore, Congress had clearly in mind the difference between acts of the Commission and acts of a member or agent of the Commission, and differentiated between them in prescribing the duties, powers and inhibitions set forth in these paragraphs.

The rights of interested parties prescribed in Section 315 (c) are therein imposed as duties of "the Commission" and are invested as rights which must be accorded *by the Commission,* not at all times, but only attaching to and during "its hearings". Obviously there is a sound and logical reason why Congress might desire to inhibit a member or agent of a Commission quietly and clandestinely disclosing trade secrets thereof, and at the same time would not attach that inhibition to the more solemn proceedings of the Commission itself when invoked by an applicant seeking favors, sitting as such and acting according to combined wisdom of all or a majority of its members. That is true of similar provisions of the Interstate Commerce acts, *infra.*

Moreover, Section 315 was the investment of an entirely new duty and function upon the Commission as a part of a legislative scheme to take tariff making away from the secretiveness of committees of Congress and place it within the powers, in so far as the investigations at least were concerned, of a *public tribunal* empowered and directed to hold *public hearings,* to administer oaths, and to take evidence and sift facts. It marked the difference between secret proceedings of the committees of Congress and the public proceedings of an independent commission.

It is expressly provided in Section 708 that *members* and *officers* of the Commission but not the Commission as such

shall not "divulge or make known in any manner whatever *not provided for by law* the trade secrets or processes of any firm," etc. In that status we are to read the two provisions of law together giving full force and effect to each, which can be done, and can be done only by applying Section 708 in all cases except where not otherwise by law provided, such as in 315 (c) when the Commission as such is holding one of "its hearings."

The penalty prescribed by Section 708 is obviously a personal penalty running to individuals and not intended to apply to the Commission acting as such. The statutory deduction, therefore, is that, reading all of these provisions together, Section 708 does not apply in cases where *the Commission* is conducting one of its hearings, and that in such cases the right to be heard accorded interested parties thereat appearing is a right unlimited by the statute, and consequently a right to be heard upon all, and not a part, of the evidence upon which the Commission intends proceeding to its conclusion including trade secrets and processes except as might be prohibited by common law.

(It will be noted in passing that a precisely analogous statute inhibiting under penalty "examiners" for the Interstate Commerce Commission from divulging certain facts (Sec. 20, Interstate Commerce Commission Act 1906, 34 Stats. 504) does not extend to divulgence thereof at the "hearings" of the Commission or courts, provided by Sec. 15 of the Act as amended June 18, 1910, (36 Stats. 552), as construed by this Court in *Interstate Com. Com. v. Louisville & Nashville R. Co.*, 227 U. S., 88-93.) The policy of Congress, therefore, seems to thus limit this inhibition.

There is a sound reason supporting this differentiation. Congress did not intend investigators tattling to competitors secrets ascertained by them; but did intend that when an application for an increased or decreased duty laid by Congress was being investigated whereby the public revenues might be affected or domestic interests destroyed,

upon the grounds that the applicant's costs were more or less than his competitors, he should bare all the facts as to his alleged different costs *even should they reside in some trade secret or process.* A trade secret or process might prove the real reason for the alleged difference in costs, wherefore every opportunity to develop and test the truth of that fact, and whether or not it was in fact and law a trade secret, should be afforded his competitors, the public, and the Government. That is the full statutory right accorded by this Act. Obviously Congress did not intend that such an applicant should conceal from full intelligent, informed public exposition his true costs of production and the real reason therefor. It was not intended that any applicant *should* obtain the great advantage of this statute by the least concealment. The statute so put him on notice and he invoked it with that notice. That this is the policy of Congress in that Act, see Sec. 501, Tariff Act of 1922, of which this is Sec. 315 (a), wherein importers seeking reduction of their duties are required to submit to cross-examination by their competitors in appraisement cases which ofttimes include *all items of the cost of production of the imported article.*

Soon after the enactment of the flexible tariff (September 21, 1922), and on October 24, 1922, the American Nitrogen Products Company, of Seattle, Washington, filed a petition with the United States Tariff Commission to increase the rate of duty upon sodium nitrite from 3 cents, as provided in said Act, to 4½ cents per pound *at the instance of this applicant.* (R. 160.) July 20, 1923, due notice was published that on September 10th, 1923, at the office of the Commissioner in Washington, "*a hearing*" in said matter would be held "at which all parties interested will be given an opportunity *to be present, to produce evidence, and to be heard with regard to the differences in costs of production and all other facts and conditions enumerated* in Sec.

315 of the Tariff Act of 1922" (R. 69, 72), affecting sodium nitrite.

At said time and place the Norwegian Nitrogen Products Company, *a New York corporation*, sole American selling agents of the Norsk Hydro-Electric Co., of Norway, importers of sodium nitrite, entered and were accorded record appearance as an interested party in opposition to said petition (R. 72) and demanded a complete copy of the petition filed by the American Nitrogen Products Company upon which the "hearing" had been noticed and was proceeding. This was denied, the Chairman of the Commission stating, "The Commission will protect the *confidential* nature of *all* information submitted to it (R. 85)". Previously a *deleted* copy thereof had been furnished petitioner with all alleged "confidential" matter (including *all* costs) stricken (R. 160, 161, 162, 163).

At this hearing, Mr. Graff, president of the applicant company, declined to give his plant capacity (R. 131) or *any* of his costs of production (R. 131). On cross-examination by counsel for this petitioner he refused to state his "costs of labor", "costs of power", or "costs of raw materials", not because "trade secrets" but because, as he stated, "that is competitive information, *it is in the hands of the Commission*" (R. 137-8), and is "*confidential* information."

On cross-examination, Mr. Graff did give his actual plant investment *in the United States* and fixed the amount at $200,000 (R. 138), whereas in his petition he stated, "Our outstanding capital stock, fully paid up, is $1,229,500" and "the above profit", "$28,000 per year", "is therefore merely nominal and would be entirely inadequate for a dividend." He was here seeking a rate that would enable him to pay dividends on a "capital investment of $1,229,500"! It was developed on cross-examination that the remaining capital invested, fair dividends upon which petitioner was asking the Commission to insure him by increas-

ing the duty on imported nitrite, was a closed plant in Canada, the cost of construction of which was included in the aforesaid stated invested capital. (R. 112-113.) The records of Congress show that it was upon the unchallenged representations by the applicant of a plant capital stock of $1,229,500 that the said increase from 1/4 to 3 cents per pound was obtained.

What greater proof of the wisdom of the statutory right provided by the Act of interested parties appearing to cross-examine witnesses could be had than is here demonstrated?

Cross-examination as to further items of cost being denied petitioner, at the continued "hearing" on September 26th, formal demand was made, as follows:

> "* * * I want to make formal requests, as an interested party appearing in this case, that we have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.
>
> "We want to make the further request that the Commission afford us the same rights to inspect, and to offer evidence in disputation thereof, if we see fit, and to be fully heard upon, all the evidence in the possession *of the Commission*, as to the *cost of power* in the United States in the production of nitrite.
>
> "Third, the same request as to the *number of laborers employed*, and *the wages paid* as shown in the American Nitrogen Products testimony *submitted before this Commission.*
>
> "Fourth, the same request as to *all capital invested* in the American Nitrogen Products Company plant in the State of Washington.
>
> "Fifth, referring to the *summary of information* in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross-examine the experts of this Commission who gathered this testimony, as to the testimony *which they have submitted to the Commission*, and that we have

> the right to offer such testimony as we see fit in opposition thereto, and that we have the right and reasonable opportunity to be heard thereupon."

Said summary was mailed appellant *September 15*, 1923. (R. 163-175.) On *October 6*, 1923, these requests, in so far as they related to inspection of evidence of costs before the Commission and the examination of the agents thereof, were formally in writing denied by the Commission (R. 146, 147, 148, 149) upon the grounds that all such information was "confidential" or "trade secrets".

The rules of the Commission (which in so far as they accord and do not conflict with the statutes have the force of and are law, Haas v. Henkel, 216 U. S. 462), accorded plaintiff *in some particulars* the rights in this case denied. These rules then in force provided: (R. 67)

> Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the *report* of the commissioner or investigator in charge of the investigation *and also the record* except such portions as relate to trade secrets and processes.

Clearly this rule accorded interested parties appearing not only the right to examine the "reports" of "investigators" as well as "commissioners", but also the "record", or facts upon which such as based, precisely what was here demanded and refused.

The rules of the Commission further provided: (R. 67)

> *Final hearing shall be before the Commission.*
> Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law.

Any effective administration of this rule required the *final* summary of the Commission should be submitted interested parties and that they thereupon be heard. The rule itself entitled them to "file briefs" thereupon. Common justice required this right and that these briefs when filed should be forwarded to the President, for *he* alone makes the findings which determine the consequent rate.

The Record (R. 70, 71) discloses that this alleged Summary of Information in the matter of sodium nitrite, made by the Commission's experts to the Commission, was not delivered to petitioner until *September 16*, 1923, with the necessity that petitioner should answer same by *September 26*, 1923. Any effective answer to that summary required the gathering of evidence from Norway beyond the seas and the State of Washington across the continent, as well as extensive study and briefing. It imposed upon petitioner a physical impossibility. Furthermore, the Record shows (R. 77 *et seq.*) when complaint was made before the Commission as to the shortness of this time and further extension requested no further time would be allowed than until *October 6 following*, or *ten days!* Furthermore, this Record shows (R. 67) that while the rules of the Commission provided that "Parties who have entered appearances, shall, *prior to the filing of briefs*, have opportunity to examine the *Report* of the commissioner or investigator in charge of the investigation and also *the Record* except such portions as relate to trade secrets and processes", petitioner was denied access to the record and was given until October 6, 1923, *and no longer* within which to produce evidence and file briefs, without any access to the record or knowledge of what proofs were in the Commission's possession in order to produce evidence in disproof thereof or brief the same. (R. 81) In truth and in fact, as shown by this Record (R. 196) the "Advisory Board's final Summary Report to the Commission" which petitioner was entitled under the rules of the Commission to examine and con-

trovert with both facts and law, was "dated *October 29*, 1923", *twenty-five days after petitioner was excluded from any opportunity to file briefs, or in any manner be heard*, as was its statutory right! Indeed, it was not until October 6th, 1923, that petitioner was finally officially denied its requests to inspect the Commission's data (R. 146-149) and therefore informed that it must rely upon *its own* resources of investigation, an obvious impossibility in the time allowed.

All of which was in gross violation of the rules of the Commission, and in violation of the statutory rights of petitioner.

Moreover, said alleged summary expressly omitted therefrom all domestic cost data or estimates of such, stating in lieu thereof that all such were "trade secrets" within the meaning of said Sec. 708, Revenue Act of 1916! (R. 171, 172.) It was not a summary of *facts* but a few unsound *conclusions of law.*

Thereupon petitioner obtained from the Supreme Court of the District of Columbia a temporary writ of mandamus, commanding the Commission to comply with petitioner's requests.

The Commission answered that *all information before it in these investigations as to plant investment, costs of labor, costs of power, and costs of material was "confidential" and "trade secrets" which it was inhibited by law from disclosing,* under the provisions of said Sec. 708 of the Revenue Act of 1916, which plainly places no legal inhibition upon the *Commission as such* while holding such "hearings", and which "costs" were not "trade secrets". Indeed, there is neither statute nor regulation which denies interested parties appearing the right to inspect and be heard upon *"confidential"* matter.

Petitioner demurred to this answer.

The Supreme Court of the District of Columbia overruled the demurrer.

Petitioner stood upon the pleadings and duly appealed to the Court of Appeals of the District of Columbia. The Court of Appeals of the District of Columbia rendered a decision *fully sustaining upon the merits every contention of petitioner;* but, taking judicial notice that, pending appeal, the Commission had made its report upon the matter to the President recommending, and he had made and proclaimed his findings and the estimated increased rate of duty, held the case moot and upon that ground alone rendered judgment against petitioner (6 Fed. Rep. (2d) 491). This Honorable Court on appeal vacated *the judgment* of the Court of Appeals of the District of Columbia *upon the point alone that the case was moot,* but expressly declined to pass upon or review the case upon its merits. *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff in Error, vs. United States Tariff Commission, Thomas O. Culbertson, et al.,* 274 U. S. 106.

Meanwhile, under authority of Sec. 514 of the Tariff Act of 1922 (42 Stats. 969; U. S. C. Tit. 19, Sec. 398), *supra,* petitioner protested the assessment by the Collector of the increased duty upon all its importations of sodium nitrite, setting forth distinctly and specifically the particulars wherein the Commission had denied petitioner its statutory rights, had failed to follow the law, had denied petitioner a fair or legal hearing, and that the said findings and proclamation of the President were void and the consequent assessment of the resultant increased rate of duty upon sodium nitrite illegal. (R. 8, 9, 10, 11, 12.)

On due hearing of said protest before the United States Customs Court the decision of the Collector overruling said protest was affirmed (R. 37) (T. D. 44824). One Judge dissented (R. 52) on the grounds that the flexible tariff act was unconstitutional.

That Court predicated its decision upon the grounds that the courts did not have the power to review such a presidential finding of facts and proclamation thereof upon *any* grounds.

On appeal to the United States Court of Customs and Patent Appeals, the *judgment* of the United States Customs Court was affirmed, but the *decision* in effect reversed. The appellate court held against all contentions of the Government save that the "hearing" contemplated by the statute (Sec. 315) had been given the interested parties appearing *by affording the mere right to introduce testimony* and without the right being afforded to inspect any of the evidence offered by the other side or data collected by and before the Commission or to examine any of the Commission's agents (R. 200-213) or to cross-examine the applicant before the Commission as to any of its stated costs, whether of labor, materials, power, or otherwise, in order to produce evidence in contradiction thereof or be heard thereupon.

To review that judgment and decision due petition was presented to this Honorable Court and granted.

OPINIONS OF THE COURTS BELOW AND THE STATUTES INVOLVED.

For the opinion of the United States Customs Court, dated April 21, 1931, see T. D. 44824 (R. 37-61).

For the opinion of the United States Court of Customs and Patent Appeals, dated May 2, 1932, see T. D. 45674 (R. 200-213).

For section 315 (a) and (c) flexible tariff provision of the Tariff Act of 1922, see Exhibit "A" hereto annexed.

For the proclamation of the President dated May 6, 1924, see (R. 196-198).

For protest of importer overruled by the United States Customs Court and by the United States Court of Customs and Patent Appeals, see (R. 8-12).

PETITIONER'S LEGAL POSITION STATED.

The legal effect of the aforesaid law and regulations read together is that the President was commanded to make

certain *Findings* and proclaim them; that his statutory assistant in the performance of that commanded duty was the United States Tariff Commission; that in the particular case as in all cases by general regulation the President directed the Tariff Commission to proceed with the commanded investigation *"in accordance with the law"* * * * and *"under rules and regulations prescribed by the Commission,"* and *until the Commission had so done the statute expressly inhibited the President from making and vested in him no power to make findings or proclaim such.*

The law provided that in the course of all such investigations the Commission should give reasonable public notice of its *hearings* and reasonable opportunity to interested parties "to be present," "to produce evidence" "*and* to be heard."

The Rules and Regulations prescribed by the Commission provided that interested parties appearing should have a right "to examine the Report of the Commissioner or investigator in charge of the investigation *and also the Record* except such portions as relate to trade secrets and processes."

It was further provided by the Commission's Regulations that parties who had previously entered appearances might file briefs and upon permission of the Commission present oral arguments.

It was further likewise provided that the findings of the Commission should be in writing and transmitted *"together with the Record,* certified by the Secretary under the seal of the Commission, to the President for his action under the law."

In this case the Record shows that the Commission did not proceed "in accordance with the law" as directed by the President in that protestant was neither afforded a reasonable opportunity "to be present", "to produce evidence", in opposition to the evidence gathered by the Commission, or "to be heard" upon any of the evidences of

costs received by the Commission made the subject of its findings or report or reported to the President. Nor did it, as required by the rules of the Commission, give interested parties appearing an opportunity to examine either the Report of the Commission or investigators in charge of the investigation, or "the Record." *All evidence as to both domestic and foreign costs of production acted upon by the Commission and the President and the findings of the Commission thereupon as transmitted to the President were withheld from petitioner.*

The Record shows that there was an absolute and complete denial of the interested parties appearing and so requesting at any and all times to examine the Record. There was an absolute and complete denial of the interested parties appearing "to be heard," as that term is defined by the law and decisions of the courts.

The Tariff Commission, therefore, not having proceeded "in accordance with the law," or as required by law, or by its and the regulations of the President, there had been no investigation by the Tariff Commission "in accordance with the law," and therefore no "*such* investigation" whatever prior to the President's findings and proclamation.

The legal dereliction and error here complained of is not on the part of the President but the Commission, which, by denying petitioner its plain statutory rights did not make for and place before the President "such" an "investigation" as Congress commanded it should for the President's more accurate and complete information, and such as is made by Congress *an express statutory condition precedent* to any findings or proclamation by the President and the legal jurisdiction or power to so find or proclaim.

That the President was given due and timely notice of and served with protest against the illegality of the proceedings of the Commission, and of the pendency in the jurisdiction of the courts of legal proceedings in remedy and challenging the legality thereof before making his find-

ings and proclamation, is shown by this record. (R. 188-194.)

Wherefore the statutory command of Congress that *no proclamation should be made by the President until "such investigation"*—that is to say, one in accordance with the law and as commanded by Congress, not having been observed, neither valid findings nor proclamation could be or were made by the President, and, in consequence, no valid assessment of duties thereunder by the Collector has been made.

SPECIFICATION OF ERRORS.

Of the several errors assigned by petitioner in the United States Court of Customs and Patent Appeals (R. 1, 2, 3, 4) essentially all thereof, save and except those relating to a denial of the legal rights of petitioner to a "hearing" and "to be present," "to produce evidence," and "to be heard" before the United States Tariff Commission, and that error was had by reason of the very limited time allowed petitioner, September 16 to October 6, to produce evidence in rebuttal of the alleged summary of facts submitted by the United States Tariff Commission were sustained. The United States Court of Customs and Patent Appeals disagreed with the opinion of the lower court, upheld the reasoning and construction contended for by petitioner in all particulars save and except that it held that petitioner had been accorded its said statutory rights as provided by the statute and rules of the President and the Commission in the above-stated particulars.

Error is assigned as follows:

(1) The court below erred in its construction and adjudged scope of the rights of the petitioner under that provision of the flexible tariff, Sec. 315 (c), Tariff Act of 1922, (42 Stats. 941; U. S. C. Tit. 19, Sec. 154), to wit, "The Com-

mission shall give reasonable public notice of its hearings, and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard," in denying and in refusing to adjudge petitioner its due and legal rights thereunder, and, in holding that thereunder petitioner had the right only to be present and introduce such evidence as it might guess pertinent or contradictory or explanatory of that in the record without being shown or knowing in whole or any part the cost data gathered by the Commission or introduced by applicant in and as a part of the record.

(2) The court below erred in refusing to follow the decision of the Court of Appeals of the District of Columbia, (6 Fed. (2d) 491), rendered herein *upon the same record,* not *obiter dictum,* and which this Honorable Court on appeal refused to disturb after declaring the same "upon the merits" of the case 274 U. S. 106.

(3) The court below erred in holding that the Tariff Commission had legally pursued the law and the duly promulgated rules and regulations relative to and controlling its procedure under the provisions of the flexible tariff, that it had made a legal and valid investigation for and report to the President and that the consequent findings and proclamation of the President were in accordance with the law and not void.

(4) That the court below erred in not holding, as was held by the Court of Appeals of the District of Columbia upon the same record, "that petitioner was by the proceedings herein deprived of its legal rights" "to produce evidence" and "to be heard", as provided by the law and due regulations, but on the contrary holding that petitioner was afforded all provided legal rights.

(5) The court below erred in holding that the said findings and proclamation of the President were not illegal and void because at the time of the making thereof the Tariff Commission had not *made* or reported to the President an

investigation in accordance with the law of the subject matter as required by the presidential order and the statute submitting the same to the Commission for such investigation and in holding to the contrary.

(6) The court below erred in not overruling and reversing the decision of the United States Customs Court refusing to sustain the protests of petitioner against the decisions of the collectors of customs herein assessing petitioner's imported nitrite, properly dutiable at 3 cents per pound under paragraph 83 of the Tariff Act of 1922 as originally enacted, at the alleged higher rate imposed by Section 315 of the said Act as estimated and found by the Tariff Commission and proclaimed by the President.

(7) The court below erred in holding that *all* items of cost production as shown by this record to be and admittedly before the Commission for the purpose of its findings and report herein, to wit, costs of materials, costs of labor, wages paid employees, number of employees, costs of power, invested capital and plant investment, were "trade secrets", and further that petitioner had not the right to inspect the same or any part thereof so as, if found desirable, to produce evidence in contradiction of or relative thereto or to be heard thereupon.

(8) The court below erred in holding that either the law or regulations empowered the Tariff Commission to refuse inspection by petitioner, in whole or in part of any cost data deleted from the application to the Commission of applicant herein or being offered in evidence by applicant at its public hearing herein, or admittedly in its possession for the purpose of proceeding herein or a full and complete summary thereof, or the final reports of its investigation or the final findings herein as intended to be and later were reported to the President upon the subject of said investigation, all the foregoing for the purpose of permitting petitioner to produce evidence contrary or relative thereto or to be heard or to file briefs thereupon, upon the grounds

that the same were "confidential" "trade secrets", or for any other reason.

(9) The court below erred in holding that the Tariff Commission gave petitioner a "reasonable opportunity to produce evidence and to be heard upon its very incomplete alleged "summary of information" delivered petitioner September 16, 1923, by granting petitioner on September 26, 1923 (R. 70-81), until October 6, 1923, *ten days* and denying petitioner any further time, under conditions shown by the record, in which to produce evidence necessarily from Norway and the Pacific Coast in contradiction of said alleged "summary of information" and to be heard thereupon, the preparation of which alleged summary required more than a year by investigators of the Commission visiting Norway and the Pacific Coast.

(10) The court below erred in affirming and not reversing the judgment herein of the United States Customs Court and directing a judgment therein overruling and reversing the decision of the Collectors of Customs herein overruling petitioner's protests, and, in not adjudging that the decisions of said Collectors of Customs were null and void for the reasons hereinbefore assigned.

ARGUMENT.

THE COMMISSION, AS SHOWN BY THE RECORD HEREIN, DENIED PETITIONER, AN INTERESTED PARTY APPEARING AND ENTERED OF RECORD, AT THE DULY NOTICED HEARING DURING THIS INVESTIGATION, THE RIGHT "TO BE PRESENT," "TO PRODUCE EVIDENCE" AND "TO BE HEARD," AND DID NOT PROCEED IN ACCORDANCE WITH THE LAW AND REGULATIONS. WHEREFORE NO "SUCH INVESTIGATION" AS THE STATUTE COMMANDS AS CONDITIONS PRECEDENT TO ANY PRESIDENTIAL FINDINGS AND PROCLAMATION HAVING BEEN MADE SUCH FINDINGS AND PROCLAMATION WERE VOID AND THE EXCESS DUTY ACCORDINGLY ASSESSED ILLEGAL.

On this issue the decision of the United States Court of Customs and Patent Appeals here sought to be reviewed is contrary to and in conflict with the decision of the Court of Appeals of the District of Columbia theretofore rendered in the case of The United States ex rel Norwegian Nitrogen Products Company, Inc., v. The United States Tariff Commission, et al., 6 Fed. (2d) 491, *both decisions being a construction of the same paragraph of the same statute in cases duly presented and decided between the same parties upon the same record. The said decision of the Court of Appeals of the District of Columbia on appeal to this Honorable Court was declared a decision "upon the merits" and was not disturbed by this Honorable Court. United States of America ex rel Norwegian Nitrogen Products Company, Inc., Plaintiff in Error, v. United States Tariff Commission, Thomas O. Marvin, et al.,* 274 U. S. 106.

The final decision of this issue involves the question: are all costs of production, costs of labor, costs of materials, costs of power, costs of transportation, costs of plant invest-

ment and equipment, overhead, etc., trade secrets or processes? The Government and the Commission so maintain. This petitioner, the great trade and labor organizations of the country, maintain the contrary. The Court of Appeals of the District of Columbia held to the contrary; the United States Court of Customs and Patent Appeals in this case essentially held the affirmative.

Upon this very important issue as to the legal rights of parties appearing in accordance with a public notice of a "hearing" before the United States Tariff Commission, to wit, the right "to be present, to produce evidence, and to be heard," no better or further argument supporting the contentions of Petitioner herein need be offered than the careful detail résumé of the facts presented by this record and its sound legal conclusions.

Judge Smith, Judges Robb and Van Orsdel concurring, Court of Appeals of the District of Columbia, in *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff in Error, vs. United States Tariff Commission, Thomas O. Marvin, William S. Culbertson, et al.*, 6 Fed. (2d) 491, rendered that decision upon the identical subject matter, record and statute here before the Court which decision, in so far as is here pertinent, is as follows:

> SMITH, Acting Associate Justice. This is an appeal from a judgment of the Supreme Court of the District of Columbia denying relators' petition praying for a writ of mandamus against the United States Tariff Commission.
>
> Sec. 315 (a) of the tariff act of 1922 empowers the President to ascertain by investigation the differences in cost of production between articles, the growth and product of the United States and like or similar articles, the growth and product of competing foreign countries. If that investigation develops that the duties fixed by the act do not equalize such differences the President is authorized to determine and proclaim the changes in classification or the increases or decreases in the rates of duty provided by the act neces-

sary to equalize foreign and domestic costs of production. Changes in classification and increased or decreased duties so proclaimed by the President take effect under the act within 30 days after the date of their announcement by the President.

Subdivision (c) of section 315 expressly provides that *no proclamation shall be issued by the President* changing the classification or increasing or decreasing duties until after an investigation of the differences in cost of production has been made by the United States Tariff Commission. That subdivision makes it the duty of the Commission to give public notice of its hearings and to afford to parties interested a *reasonable opportunity* to be present, *to produce evidence and be heard.* The rules, which the Commission is authorized to adopt, prescribe that parties who enter an appearance in the investigations provided for by section 315 shall have the opportunity to examine *the report* of the Commissioner or investigator in charge of the investigation *and* also *the record,* with the exception of such portions of the report or record as relate to trade secrets or processes which section 708 of the act of 1916 forbids the Commission to divulge.

On the 24th of October, 1922, the American Nitrogen Products Company, a Corporation, organized under the laws of the State of Washington, filed with the United States Tariff Commission, a petition and brief praying that the duty of three cents a pound imposed on sodium nitrite by the tariff act of 1922 be increased to 4½ cents per pound. On the 20th of July, 1923, notice was given by the Commission that a public hearing would be held at its office at 10 o'clock a.m., on the 10th of September, 1923, concerning the subject-matter of the petition and that at that time and place the parties interested would be given an opportunity to *be present,* to *produce evidence* and to *be heard* as to differences in cost of production and as to all other facts and conditions pertinent to the matters which were then to be the subject of investigation.

On the 10th of September, 1923, the Norwegian Nitrogen Products Co., appeared before the Commission *and made a formal request that it be given a copy of the petition which initiated the investigation and which*

was filed by the American Nitrogen Products Company. To that request the American Nitrogen Products Company objected on the ground that *all information* given to the Commission *as to* its *capital assets* and *costs of production* was *confidential* and *was furnished on the promise that it would be so treated by the Commission.* The Chairman announced that "the Commission has considered that when anyone submits information to it which it declared to be *confidential* it shall observe the *confidential relation.*"

On the 11th of September, 1923, the Norwegian Nitrogen Products Company *in writing* formally requested that it be supplied by the Commission with *all facts* submitted to the Commission and also with a *complete* copy of the petition in order that the Company might *be heard* on the matters set forth therein. In the written request was included a brief in which it was stated that the Norwegian Nitrogen Products Company was entirely in the dark as to the real case and actual facts presented to the Commission by the American Nitrogen Products Company and that therefore the opposition to the petition was not in a position to meet the case or the facts so presented. The brief also urged that until the opposition had information as to all matters and every particle of evidence *not trade secrets* submitted to the Commission, no valid finding by the Commission could be had. The Commission ruled that it had obtained its cost data under *pledges of confidence* and that it could not violate those pledges of its own motion. The Commission therefore declined to accede to the request of the opposition.

The Commission furnished to the appellant the application of the American Nitrogen Products Company for an increase of duty, from which application however *was deleted all data* as to *costs of production* AND *all matter deemed to be confidential by the Commission.* Appellant was also favored with a *so-called summary* of information in which it was stated that the domestic price of soda ash, an important material in the manufacture of sodium nitrite, was on September 10, 1925, $1.45 per 100 pounds in bags at makers' works; that the normal consumption of sodium nitrite in the United States was about 6,000,000 pounds per

year, and that domestic producers had plant capacities equal to about 87 per cent of that requirement; that from 1¾ to 3½ million pounds of sodium nitrite were imported annually during the period 1914 to 1921 excepting the year 1920, in which year 11,690,000 pounds came into the country from abroad; that 50 per cent of the demand for sodium nitrite in the United States was supplied by imports; that during the 4th quarter of 1922, 1,460,528 pounds of sodium nitrite were imported at an average declared value of 4 cents per pound; that during the first 6 months of 1923, 3,647,125 pounds of nitrite were imported at an average declared value of 4.4 cents per pound; that the exports of sodium nitrite from Norway to the United States during March, April, and May, 1923, were 1,070,000 pounds; that the average invoice value was 4.84 cents per pound c. i. f. New York, from which was deducted packing, inland freight, ocean freight and insurance, leaving *an average price at the factory in Norway 4.34 cents per pound. An estimate of the cost of producing sodium nitrite in Norway* was also supplied. *With the exception of freight rates on soda ash and the domestic price thereof no information whatever was apparently given to the appellant as to the domestic cost of producing sodium nitrites.* After receiving the summary of information the opposition *again demanded 1st, a reasonable opportunity to inspect and to be heard upon all evidence which had been offered in the case, not deemed by the Commission to be trade secrets, and not, in fact, trade secrets or processes; 2nd, an inspection of all the evidence* in the possession *of the Commission* as to the *cost of power* used in the United States for the production of nitrite; 3rd, information as to the evidence submitted *to the Commission* concerning the *number of laborers employed by the American Nitrogen Products Company and the wages which they received;* 4th, inspection of the evidence submitted *to the Commission* as to the *capital invested* by the American Nitrogen Products Company; 5th, an opportunity to *cross-examine the experts* of the Commission *as to the evidence submitted by them to the Commission.*

The Commission ruled that it would permit the opposition to be heard and to introduce any evidence that

it might have, but that it *would not supply any information whatever in addition to* that furnished by its summary of information. Inspection by the opposition of any original or primary data collected by the Commission and cross-examination of the Commission's investigators as to any of the information secured by them was also refused. *The capital invested by the American Nitrogen Products Company, the value of its plant, the number of laborers employed by the Company, the wages paid and all details as to the cost of production of nitrites was held by the Commission to be confidential information, to which the opposition was not entitled.*

While the investigation of the differences of costs of production of sodium nitrite in the United States and in competing countries *was still pending before the U. S. Tariff Commission* and before its report as to the results of the investigation had been transmitted to the President, the relator on the 12th of September, 1923, filed in the Supreme Court of the District its petition for a writ of mandamus which recited in substance the facts hereinbefore stated and prayed 1st, that a rule or order be granted directing the Tariff Commission and its members to appear and show cause why a writ of mandamus should not issue requiring them to permit the relator to examine the petition of the American Nitrogen Products Company and all data or information or evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Co. whether in the United States or out of it; 2nd, that the Tariff Commission and its members show cause why a public hearing should not be allowed at which the relator and any person or corporation appearing before the Commission, having an interest in the subject-matter, should have the right and opportunity (a) to cross-examine the investigators, experts, agents and witnesses who may have supplied data, information or evidentiary matter to the Commission; (b) to offer evidence in contravention of such data, information and evidentiary matter; (c) to present arguments and representations against said petition and against the probative and legal value of any and all data, information

and evidentiary matter on file with the Commission upon which the American Nitrogen Products Company based its application for an increase of duty on sodium nitrite.

The Supreme Court issued an order to show cause in accordance with the prayer of the petition and in response to the order the Tariff Commission filed its answer in which the demands made by the relator and the rulings thereon as hereinbefore set out were substantially admitted. To the answer a demurrer was filed which was overruled by the court and the relator electing to stand upon its demurrer the court on the 28th of April, 1924, ordered, adjudged and decreed that the prayer of the petition be denied and the petition dismissed. From that judgment this appeal was taken.

After the denial of the petition for mandamus and the dismissal of the petition, the Tariff Commission submitted to the President a report of its investigation of the cost of production of sodium nitrite in the United States and the production, cost thereof in Norway, the principal competing country. Subsequent to that report and on May 6, 1924, the President issued a proclamation in which was recited the investigation made by the Tariff Commission and the President's *finding* that the costs of production in the United States and Norway, the principal competing country, were not equalized by the duties imposed by Congress on sodium nitrite.

The proclamation also declared that it was necessary to increase the duty on sodium nitrite from three cents to 4½ cents per pound in order to equalize costs of production and accordingly advanced the duty on sodium nitrite from 3 cents to 4½ cents per pound.

The Tariff Commission contended in the lower court and contends here that Section 315 of the Act of 1922 requiring the Commission to give reasonable public notice of its hearings and a reasonable opportunity to interested parties to be present and produce evidence and to be heard, grants to the interested parties nothing more than the right to present to the Commission such evidence as they may have and to argue their case. We cannot agree with that contention.

Under the act of 1916 the Tariff Commission was a mere investigative body charged with the duty of gathering tariff information and submitting the same whenever required to the President, the Committee on Ways and Means of the House and the Committee on Finance of the Senate. Unquestionably under that act the Tariff Commission might hear or not hear interested parties and whether it heard or refused to hear them no harm could come to any one inasmuch as no change of duty could be accomplished without the intervention of Congress. Congress was not bound by anything that the Commission might do, say, recommend or find and was entirely free to practice investigations on its own account and to reach a conclusion as to the facts and the inferences to be drawn therefrom utterly at variance with that reported by the Commission.

Section 315 of the Tariff Act of 1922 however sought to make the dutiable list more flexible by giving to the President in certain contingencies and after investigations made by the Tariff Commission the power to change the rates of duty fixed by Congress. Under that Section the rates of duty prescribed by statute may be increased or decreased 50 per cent by the President. That is a very large grant of power if grant it be and for its exercise nothing is required except an investigation and report by the Tariff Commission.

For the correctness of his decision the President must rely on the Commission's fairness, its knowledge of the facts as they are and the verity of its findings and report. For the accuracy of its report and the wisdom of its recommendations, the Commission in its turn depends on ex parte testimony taken by it and on the unverified reports of its investigators in the field after such testimony and reports have been subjected to the test of the *hearing which the statute and the Commission's rules prescribed.*

For the purposes of Section 315 the Commission is no longer left free to hear whom it pleases or what it pleases. It is required by law to give reasonable public notice of the hearing prescribed by the section and to give reasonable opportunity to parties interested to be present, to produce evidence and to be heard. That

notice and the right of interested parties to be present, to produce evidence and to be heard, was not designed as the Commission contends to aid the Commission in getting the economic facts. The Commission needed no such help inasmuch as the act of 1916 as originally passed furnished to that body adequate and effective means to secure all data, evidence, facts information and apparently even trade secrets and processes pertinent to its inquiries. (See Section 706 and 708 of the Act of September 8, 1916 (39 Stat. 797-798.)

The right of interested parties to be present, to produce evidence and to be heard at the hearings contemplated by section 315, *was granted by Congress and not by the Commission. That right was conceded to adverse interests to protect them against the abuses of ex parte hearings and proceedings and against ex parte statements and evidence which if made known to those opposing a change in rate, might be discredited, controverted or refuted.*

The Commission in the exercise of the authority conferred upon it by the act of 1916, through its investigators gathered data as to *capital investment, cost of power, wages paid to labor and the cost of production of nitrites in the United States and abroad.* Its refusal to disclose any of that information with the exception of the price of soda ash reduced to little better than an empty form the right of the opposition to be present to produce its evidence *and to be heard.*

Of what value to the opposition was the right to produce evidence if the opposition knew nothing of the data collected by the Commission or of the facts or evidence submitted to the Commission for its consideration in reaching a conclusion as to the cost of production of nitrites? Just how was the opposition to meet the petition of the American Nitrogen Products Company if the former was not permitted to see the petition of the latter and was supplied with nothing better than a deleted copy from which was omitted every material allegation as to the costs of production set out in the petition actually filed with the Commission? Of what use to the opposition was the right to introduce evidence on its part and to argue the case if it had no knowledge of the data gathered by the

Commission or of the information submitted by the American Nitrogen Products Company or of the issue raised by the petition and the evidence.

To hold that the right to be heard means simply the right to produce evidence and to argue the case would leave interested parties at the mercy of those who initiated the proceeding and render useless the safeguard which Congress manifestly interposed to protect importers, merchants, industrials, consumers and even the Commission itself from unreliable data, insufficient evidence and mistaken conclusions of fact.

Barring trade secrets and processes the disclosure of which is expressly forbidden, *the opposition by virtue of its statutory right to be heard, was entitled to be informed of the facts and evidence privately presented to the Commission* for its consideration. St. Louis, Southwestern R. R. Co. v. I. C. C., 264 U. S. 64, 78. Indeed, *under the rules of the Commission* itself, the Norwegian Nitrogen Products Company should have been given an opportunity *to examine the record and the reports* of the Commission or investigator in charge of the investigation.

The term "trade secrets" as ordinarily understood, means an unpatented secret commercially valuable plan, appliance, formula or process which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities. In re Bolster, 59 Wash. 655; National Tube Co. v. Eastern Tube Co., 3 Ohio (C. R.) 459, 462, 464.

There is nothing in the record showing and the appellee does not claim that the making known of any of the costs of production involved the disclosure of any unpatented, secret commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of articles or materials. For the purposes of this case therefore, the costs of production demanded by the opposition cannot be regarded as trade secrets.

Costs of production of and by themselves are simply matters of business privacy, the disclosure of which is not forbidden by section 708 of the act of 1916.

Business privacy will be protected, it is true, from more fishing expeditions in search of evidence (Fed-

eral Trade Commission v. American Tobacco Co., 264 U. S. 298, 305-306) and from the prying scrutiny of those who have no higher motive than curiosity, illicit gain or malice. The disclosure of matters of busness privacy may be compelled however if such matters be material and relevant evidence for the protection of the public or for the determination of the rights of interested parties by a legally constituted tribunal or body authorized to procure and consider such evidence. Bank of Columbus v. Okely, 4 Wheat. 235-244; United States v. Louis. & Nash. R. R., 236 U. S. 318.

As the Commission denied to the appellant access to facts, data, information and reports which it had received for consideration as to the cost of producing nitrites in the United States *on the sole ground that* such facts, data, information, evidence and reports *were confidential* and as it does not appear from the record or the finding of the Commission that the examination thereof involved the disclosure of any unpatented, secret, commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of nitrites, *we are of the opinion that the appellant was deprived of the right to be heard as contemplated by the statute.*

Notwithstanding the fact, however, that the appellant was not given the hearing prescribed by section 315, we are convinced that the granting of the writ prayed for would afford to the appellant no substantial relief. The purpose of the investigation made by the Commission in this case was to furnish to the President information which would enable him to determine differences in costs of production, and to fix within the limits prescribed by statute a rate of duty which would equalize such differences. The Commission has made its investigation and reported the results thereof to the President. The President has already acted on that report found the differences in costs of production and made his decision as to the rate of duty which would equalize such differences.

Mandamus to the Commission requiring it to make the disclosure demanded in order that the appellant might be properly heard, would not in any way modify, affect or violate the rate of duty fixed by the President

or compel him to fix a new rate or to restore the rate prescribed by the act of 1922.

* * * * * * * * *

If the Commission had made its report to the President in violation of a valid restraining order or writ of injunction, the appellant would not have been left without a remedy and the court would be diligent in its endeavors to correct as far as the law permitted, the wrong resulting from a contemptuous disregard of its orders. The cases cited by the appellant fully sustain that doctrine, but as no restraining order of any kind was in force at the time the report of the Commission was made to the President, the citations upon which the appellant relies are inapplicable to this case.

The judgment appealed from is affirmed with costs. (Italics ours.)

That said decision was "*upon the merits*" was declared by this Court. *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff, v. The United States Tariff Commission, et al.*, 274 U. S., 106. Said decision was not *obiter dictum.*

The precise point has been decided by this Court repeatedly. It will suffice to quote from *Railroad Companies v. Schutte*, 103 U. S. 118, wherein the identical point was passed upon by that court, stating:

"As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. *The point was directly made by the pleadings and as directly passed on by the court.* Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, *the decision was in no just sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.* Here the precise question was properly pre-

sented, fully argued, and elaborately considered in the opinion."

See also *Meyers v. United States,* 272 U. S. 220; *Union Pacific Co. v. Mason City Co.,* 199 U. S. 166; *United States v. Title Insurance Co.,* 265 U. S. 472, 486.

That is the exact status of this decision.

Thereafter, in 1930, Congress in re-enacting the flexible tariff with many changes expressly re-enacted the provision thereof construed by the court in said case essentially in *haec verba,* thereby legislatively approving the construction thereof by said Court.

In justification of the course of petitioner in not applying for an injunction restraining the United States Tariff Commission from transmitting said report to the President pending appellate proceedings upon its petition for a Writ of Mandamus, this Record discloses (R. 194) that the Chairman of the United States Tariff Commission had assured counsel for petitioner that said report would not be made to the Chief Executive pending said proceedings.

Moreover, the Commission (R. 188-192) having been notified in writing, supported by citation of decisions of this Court that such ousting of jurisdiction of the Courts would be contempt of court, a legal truth impliedly acquiesced in by this Court in said quoted decision, petitioner had the legal and ethical right to assume that sworn public officials would not so violate the jurisdiction of the courts.

The decision of the United States Court of Customs and Patent Appeals here sought to be reviewed gives to the words "to be present, produce evidence *and* to be heard" the right "to be present" and "to produce evidence" *only,* thereby reading out of the Act any different office, force or effect of the words "to produce evidence" *and* "to be heard." It likewise denies the word "hearing" as used in the Act its well-settled legal scope. So viewing the law, that Court held petitioner legally entitled to a hearing but

that on this record as hereinbefore analyzed petitioner had been afforded such rights as are accorded by the statute by being accorded only the right to be present and produce such evidence it desired to offer without knowledge or reference to that in the record or what thereof the Commission intended as a basis for its report, findings or recommendations to the President. (R. 205-208.)

The Court's view gives no effect to the words "*and* to be heard", for, if the sole right accorded is to offer one's own evidence without regard to that elsewhere in the record, that right is fully accorded by the words "to produce evidence" leaving the remaining words "*and* to be heard" without office. Indeed, the right "to produce evidence" cannot be legally or in its literal fullness exercised until there is known what and all proofs or evidence are in the record necessary of refutation by producing contrary proofs and evidence. Without that knowledge the right "to produce evidence" in any case cannot in its fullness or fairly be exercised.

That one cannot be "heard" in a case, or that there can be a legal "hearing" upon a subject matter, without examination or knowledge of all the evidence in the record, is so well settled that it seems almost trite of statement or citation. It is uniformly so held. *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S., 88-93, and numerous cases cited. *Monroe Gas & Fuel Co. v. Michigan P. U. Co.*, 292 Fed. Rep., 139-148; *St. Louis Railway Co. v. Interstate Commerce Commission*, 264 U. S., 64; *Atchison, Topeka & Santa Fe R. R. Co. v. United States, &c.* (decided January 4, 1932), 284 U. S., 248.

That the denial of a right "to be heard" prescribed by the statute renders all findings and orders thereupon predicated *void* has long since been settled by plenary authority in addition to the aforesaid decision of the Court of Appeals of the District of Columbia.

It has been uniformly held by this Court that the denial of the right to be heard before a tribunal such as the Inter-

state Commerce Commission, constitutes a justiciable question and failure thereof renders all subsequent orders void.

Precisely analogous acts providing penalties for disclosing certain evidence and "hearings" have been construed by this Court.

Section 20, Interstate Commerce Acts of 1906, 34 Stat. 594, 4 Fed. Stat. An. 505, reads:

> (Sec. 20 continued. (*n*) *Examiner divulging facts, etc.—penalty.*) Any examiner who divulges any fact or information which may come to (sic) his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon any conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars, or imprisonment for a term not exceeding two years, or both.

Like this act, which provides certain investigations by the Tariff Commission of its own motion as well as by direction of the President, that Act by Sections 12 and 13, 36 Stat. L. 551, 4 Fed. Stat. An. 448-454, provided for investigations by the Interstate Commerce Commission of its own motion *and* upon complaint of interested parties.

Sec. 708 and Sec. 315 here in issue, when read together, as parts of the same code of official duty, in legal effect provide exactly the same as said Section 20 of the Interstate Commerce Act. Sec. 708, enacted in 1916, provided penalties for any "member" of the United States Tariff Commission, "employee, agent or clerk" thereof "to make known in any manner whatever *not provided by law* * * * *the trade secrets* or processes of any person," &c. Section 315 (c), enacted in 1922, directing the *Commission as such* to hold *"hearings"* in certain cases, is a subsequently enacted "manner provided by law", in the language of Sec. 708, authorizing the Tariff Commission to so make

public, exactly as Sec. 20 of the Interstate Commerce Act authorizes that Commission to so make public *all* matters developed at its "hearings." *In other words, the legal conspectus in both cases excepts from the penalties the divulging of any information whatever its character at a "hearing" held by either commission as such.*

Section 15 of that Act as amended June 18, 1910, 36 Stat. L. 552, 4 Fed. Stat. An. 468, provided for "hearings," "full hearings," and "any hearing," reading as follows:

> (Sec. 15 continued. (*b*) *New rates, classifications, etc.—final determination—extension of suspension—hearing of rates increased since January 1, 1910.*) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either *upon complaint* or *upon its own initiative without complaint,* at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, *but upon reasonable notice,* to enter upon a *hearing* concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering it to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after *full hearing,* whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective. *Provided,* That if

> *any such hearings* can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At *any hearing* involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the *hearing* and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. (24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. 552.)

This Court in *Interstate Commerce Commission vs. Louisville & Nashville R. Co.*, 227 U. S. 88 at page 93, interpreted the meaning of the word "hearing" as used in such and similar acts, numerous citations therein in support of the text of said decision being cited, stated:

> "The Government further insists that the Commerce Act (38 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore *its findings must be presumed to have been supported by such information,* even though not formally proved at the hearing. But *such a construction would nullify the right to a hearing,* for manifestly *there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute.* The information gathered under the provisions of Sec. 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, *but is not available, as such, in cases where the party is entitled to a hearing.* The Commission is an administrative body, and even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as

to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm. v. Baird,* 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. *In such cases the Commissioners can not act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States v. Baltimore & Ohio S. W. R. R.,* 226 U. S. 14."

It will be particularly noted that this Court in that case at page 91, held, that where a "hearing" is so provided and is not so held as to *all the data* upon which decision is based *the order of the tribunal made without such hearing is null and void.* The Court said:

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, *are void if a hearing was denied; if that granted was inadequate or manifestly unfair;* if the finding was contrary to the 'indisputable character of the evidence.' Tang Tun v. Edsell, 223 U. S. 673, 681; Chin Yoh v. United States, 208 U. S. 8, 13; Low Wah Suey v. Backus, 225 U. S. 460, 468; Zakonaite vs. Wolf, 226 U. S. 272; or if the facts found do not, as a matter of law, support the order made; United States v. B. & O. S. W. R. R., 226 U. S. 14; Cf. Atlantic C. L. v. North Carolina Corp. Com., 206 U. S. 1, 20; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301; Oregon Rail-

road v. Fairchild, 224 U. S. 510; I. C. C. v. Illinois Central, 215 U. S. 452, 470; Southern Pacific Co. v. Interstate Com. Comm., 219 U. S. 433; Muser v. Magone, 155 U. S. 240, 247."

Mitchell Coal Co. v. Pennsylvania R. R. Co., 230 U. S. 282;
Louisville & Nashville R. R. Co. v. Bosworth, 209 Fed. Rep. 380-445;
Atchison, Topeka & Santa Fe R. R. Co. v. Spiller, 246 Fed. Rep. 18;
Abilene & S. R. R. Co. et al. v. U. S., 288 Fed. Rep. 102-110.

It is further held in said case at page 93 that any order of the Commission based upon testimony or evidence or data collected by its agents or the Commission and *not subjected to the examination by interested parties appearing is void.*

A very late decision by the United States Circuit Court of Appeals, *Monroe Gas Light & Fuel Co. vs. Michigan P. U. Comm.,* 292 Fed. Rep. 139-148, granting an injunction against enforcement of a gas rate prescribed by the Michigan Public Utilities Commission affirms this doctrine, stating:

"The only evidence before the Commission was the report of its own engineers, who, both as to reproduction cost and original cost, made this estimate of about 14 per cent. The only additional evidence before the court is that of the Utility's engineers, who testify that the proper allowance is about 20 per cent. *If, perchance, the Commission had in mind evidence or papers in other cases, or general documents in its files which showed that 14 per cent was too high, it had no right to base its findings on such documents or evidence without calling them to the attention of the Utility and giving it a chance to be heard.* U. S. v. B. & O. S. W. Ry., 226 U. S. 14, 33, Sup. Ct. 5, 57 L. Ed. 104; Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91, 93, 33 Sup. Ct. 185, 57 L. Ed. 431; U. S. v. L. & N. Ry., 235 U. S. 314, 321, 35 Sup. Ct., 59 L. Ed. 245."

The same doctrine was announced by this Court in the very late case decided February 18, 1924, of *St. Louis Railway Co. vs. Interstate Commerce Commission*, 264 U. S. 64. Therein was under consideration "the valuation" provisions of the Interstate Commerce Act of 1913, 37 Stat. L. 703, reading:

> "If notice of protest is filed the Commission shall fix a time for *hearing* the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest as filed as aforesaid. If after *hearing* any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date hereof."

This Court in that case after reciting the technical grounds relating to the pleadings upon which affirmance of the dismissal of the petition was grounded, lest that order might be construed a decision against the legal construction claimed for the word "hearing" in that act, proceeded to affirmatively construe that word and define what thereunder "we think that the relator reasonably may demand." This court then proceeded to define the legal rights of relator by virtue of a "hearing" if properly demanded under the aforesaid statute in the following language:

> "But on the other hand, since it must grant a *hearing*, manifest justice requires that the railroads should know the facts that the Commission supposes to be established, and we presume that it would desire the *grounds* of its tentative valuation to be subjected to searching tests. * * * we think that, in such ways as may be found practicable, the relator should be enabled to examine and meet *the preliminary data* upon which the conclusions are found and to that end should be given further information *in evidence of the hearing*

sufficient to enable it to point out errors, if any there be." (Italics ours.)

It will be noted that while the petition for the writ of mandamus in that case was denied it was because of the extraordinary scope of the petition. No particular or definite items or classes of data were demanded. It sought an examination of *all* the data collected by the Commission in that *and other cases*, upon the subject in which relator was interested, before any hearing was being held and, as expressly indicated by the court "before they were offered in evidence before the Commission in any hearing."

In this case the information desired was specifically alleged as to *kind, class* and subject matter by the petition, was specifically so requested of the Commission *at the hearing* and again in writing and so denied in writing. (R. 78-79-185-186.) In the cited case, however, it will be particularly noted that the Supreme Court took precise care not to repudiate but did reaffirm the rule of law previously announced by that court in *Int. Com. Comm. v. L. & N. R. R. Co.*, 227 U. S. 88. In other words, while the petition was, for reasons relating to the form thereof in that case, denied, the court expressly and specifically laid down the precise legal amplitude of the word "hearing" exactly as contended for by appellants *in this case* and *advised* the Commission in that case to proceed exactly as that court *ordered* in the last cited case.

In this case *specific questions* were asked Mr. Graff as to items of costs of labor, material, power, etc., to all of which objection was sustained by the Commission upon the ground that such were "confidential" or "trade secrets."

The functions delegated by the Interstate Commerce Act and the Flexible Tariff are essentially alike, with quasi-judicial powers added. The sole difference is that the former are all entirely performed by a Commission and the latter by a Commission conjointly with the President. The Flex-

ible Tariff Act is in legal effect the same as if the whole investigation was to be made by the President *after "hearings", for he cannot act until such are had by the Commission only, for and on his behalf as a part of his expressly delegated authority.* He cannot legally act or proclaim or order a change in a rate of duty until *the Commission* has *legally* investigated the same. The Commission cannot legally so investigate until it has acted as prescribed by Congress, to wit, after the statutorily prescribed notice and *hearings.* Without such all that follows is *void.*

For a very late decision of this Court (January 4, 1932) to the same effect, see *Atchison, Topeka & Santa Fe R. R. Co. v. United States,* 284 U. S., 248, opinion by Mr. Justice (now Chief Justice) Hughes, it is held:

> "The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, *a fair hearing* is a fundamental requirement. *Interstate Commerce Commission v. Louisville & Nashville Railroad Company,* 227 U. S., 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. *We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right.* The *order of the Commission* which was thus made effective and the ensuing supplemental order, *can not be sustained."*

That this Act and the like provisions of the Interstate Commerce Act are comparable for purposes of judicial interpretation is supported by *J. W. Hampton, Jr. & Co. v. The United States,* 276 U. S., 394, wherein this Court sustained the constitutionality of this Act in part citing in support thereof similar delegation of powers and like statutory provisions in the Interstate Commerce Act and decisions thereupon.

The class of decisions typified by *Londoner v. Denver,* 210 U. S., 373, 386, wherein hearings accorded a property owner upon assessment of his property are plainly distinguished in and by a class of cases such as *Hager v. Reclamation District No. 108,* 111 U. S. 701.

In that case this Court pointed out in detail what would be the different requirements in different tax proceedings in order to satisfy the constitutional *or statutory requirement* of due process of law as to accorded hearings and rights to be heard. After commenting upon the fact that in certain cases such as poll taxes, license taxes, and specific taxes upon things or persons or occupations that no notice can be given to the taxpayer or that notice would be of no possible advantage to him, the court proceeded to state at page 709:

> 'Yet there can be no question, that the proceeding is due process of law, *as there is no inquiry into the weight of evidence, or other element of a judicial nature,* and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded."

And, at page 710, the court continues:

> "But where a tax is levied upon property not specifically, but according to its value, *to be ascertained* by assessors appointed for that purpose *upon such evidence as they may obtain, a different principle comes in."*

In the Kentucky Railroad Tax Cases, 115 U. S. 321, at page 333, this Court comments upon the fact that the required return of the railroad companies to be filed with the Commission on certain dates is legal proof required by the companies and constitutes a public record open to inspection to all. Further commenting upon the nature of its meetings, which are similar to those at all boards of equalization, the court stated:

> "These meetings are public, and not secret. The time and place for holding them are fixed by law. *The proceedings of the board are required to be made matters of record* and authenticated by the signature of the quorum present. Any one interested has the *right to be present.* In reference to this point, the Court of Appeals of Kentucky, in its decision in these cases, says * * * 'As we construe this act, although in the nature of an original assessment, the parties had the *right to be heard,* and were in fact heard before the board passing on the question of valuation."

A careful review of the cases often cited in this proceeding, to wit, Pittsburgh and C. Railway Co. v. Backus, 154 U. S. 421, 426; Home Telephone Co. v. Los Angeles, 211 U. S., 265, 278; Londoner v. Denver, 210 U. S., 373, 386, will disclose that they are subject to the same considerations.

Adopting, therefore, the doctrine of this Court in the Hagar Case that the rights of interested parties in tax proceedings to be present and to be heard accorded by the statute under its due process of law provisions, *or in the absence of such by statute,* "is meant one which, *following the forms of law,* is appropriate to the case, and just to the parties to be affected," and which "must be adapted to the end to be attained," a review of the cases discloses that those cases holding *the right confined to argument and new proof* are where under the law opprotunity was afforded interested parties to inspect all evidence and data before the tax tribunal and upon which it was proceeding to decision of judgment.

For example: It will uniformly be found true that where a proceeding was one to fix a tax rate upon a corporation, the corporation was on a day certain required to file with the Commission a statement of its properties, the extent thereof, etc., etc., upon which was to be based the rate of charges or the tax to be fixed by the Commission. So in

state and county tax proceedings, the boards of equalization uniformly have before them, sent up by the assessors below, a complete statement of the tax levied upon the property of each and every taxpayer separately in the jurisdiction. In other words, all of these tribunals in their public hearings have before them, open to the inspection of all interested parties appearing therein a complete statement of all the evidence which, up to that time, has been placed before them or has been taken by them for the purposes of their proceedings. This being the status public notice of their hearings is published, whereupon all evidence for or against a rate levied or to be levied *is produced at the public hearing.* The statute, and notice published, giving to interested parties the right to be present and to hear, by reason of this status, all the evidence previously had and to be taken at this public hearing is thus satisfied. There is no particle of evidence taken upon which action is to be had, not open to the inspection of interested parties appearing at these hearings, either as a part of the record or taken in the presence of interested parties appearing at these hearings. *That being true nothing remains to be done but to offer evidence in contradiction thereof or argument thereupon.*

In this case we are denied exactly what in such cases is granted, to wit, inspection of all matters in possession of the Commission upon which they are to proceed to make findings and report.

Moreover, this is a different class of cases. This is one of that different class of cases spoken of in Hagar v. Reclamation District, *supra,* where there is an "inquiry into the weight of evidence." Herein, in lieu of assessment lists and relative valuations, returned by the assessor, or in lieu of statements filed by corporations of their investments, etc., there is upon the secret files of the Commission a complaint or petition alleging certain facts, reports of various officials submitting certain data and other

documentary evidences, specifically evidencing cost of production, cost of labor, cost of materials, cost of power, and other similar costs.

The inquiry here is as to the weight of such evidence. The right to be heard here is upon all the evidence in the case if that right is to be of effective avail. The record is an entirely different one. The right "to be heard" under this statute is not by the statute confined to a *part* of the record upon which the Commission is to proceed. There is no such limitation prescribed by the statute and there is no power in the Commission to so limit this right. An illustration is had in The State v. New Jersey, etc., 25 N. J. Law, 309, at page 311, wherein it was held the state order requiring the board of equalization "to hear and consider any objections" offered to a tax is not complied with when limiting the hearings to written objections filed therewith.

The legal principle here involved and invoked is precisely as long established by this Court in customs appraisement cases.

That a determination by an appraiser or Board of General Appraisers of a question of law in the course of their proceedings in the determination of foreign market value, including foreign costs of production, is reviewable by the courts, and that any error of law therein renders the report to the Collector of findings of fact void and in consequence the Collector's decision as to the amount of duty is likewise void.

The attention of the Court is particularly called to the fact that these cases, like which there are many others decided by this Court over a long period of our history, concerned the taking into or refusing consideration by local customs appraisers or boards of customs appraisers as legal, items and evidences of market value or costs of production; that such ultimately reached and were finally

decided by this Court as legally or illegally so admitted in or regarded as legal evidence, and that thereby the decisions of the Collector based thereupon were void.

Exactly such is the issue here presented.

In *Arthur v. Goddard*, 96 U. S., 145, 147, this Court held that the inclusion of a discount as part of market value by appraising officers was shown by the record to be a decision of a question of law and therefore reviewable by the courts. The court at page 147 said:

> "In this case, the appraisers did not profess to appraise or ascertain the market value of the goods. They simply gave a construction to the invoice; they decided its legal effect to be that 8,670.25 francs is there declared to be the market value of the goods. *They held as a legal proposition*, that, in fixing the value, the discount of two per cent should not be allowed; and, as a result of this, that 8,670.25 francs, and not 8,494.95 francs, was the value."

This Court held in consequence the duty thereupon by the Collector found due and assessed invalid.

So, in United States v. Passavant, 169 U. S., 16, at page 20 this Court said:

> "And while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector *has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute.* Oberteuffer v. Robertson, 116 U. S., 499; Badger v. Cusimano, 130 U. S., 39; Robertson v. Frank Brothers Company, 132 U. S., 17; Erhardt v. Schroeder, 155 U. S., 124; Muser v. Magone, 155 U. S., 240.
>
> " * * * Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, *was a question of law*, and properly carried to the board of general appraisers by protest and appeal." And as here, from there to this Court.

In *Robertson v. Frank Brothers,* 132 U. S., 17, the appraiser added an *estimated value* to the invoice of shipping charges and labor connected therewith on certain bananas for the shipping of them *into* Aspinwall. The question was whether *actual* shipping charges or *estimated* shipping charges was a rule prescribed by law in such cases. The point was raised that the appraisement was not open to impeachment by the courts. This Court in that case said at page 24:

> "But it is contended that the act of the *appraiser* in making, or requiring to be made, the *additional charges for transportation and labor was final and conclusive,* and cannot be made the subject of inquiry. It is undoubtedly the general rule that the valuation of merchandise made by the appraiser, unappealed from to merchant appraisers, is conclusive. But whilst this is the general rule, it is subject to the qualification that *if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear,* his appraisement is not unimpeachable. ***This qualification applies*** *to the acts of many other officials charged with duties of a similar character, such as assessors of the value of property for taxation, commissioners for appraising lands taken for improvements, or damages sustained by owners of land and the like."*

This court held the appraisement and collector's levy of duties illegal for the reason stated and affirmed the right of the court to review these questions of law decided by the appraising officers.

In Muser v. Magone, 155 U. S., 240, at page 246, this Court thus stated the rule:

> "The conclusiveness of the valuation of imported merchandise made by the designated officials, in the absence of fraud, is too thoroughly settled to admit of further discussion. Hilton v. Merritt, 110 U. S., 97; Auffmordt v. Hedden, 137 U. S., 310; Passavant v. United States, 148 U. S. 214. * * *

> "Yet, though the valuation is final and not subject to review and change and reconstruction by the verdict of a jury, it is open to attack for want of power to make it, as where the appraisers are disqualified from acting; or have not examined the goods; or *illegal items have been added independent of the value. The principle applied in such cases is analogous to that by which proceedings of a judicial nature are held invalid because of the absence of some strictly jurisdictional fact, or facts essential to their validity.*"

The power of the federal courts to lay hold of the federal jurisdiction and to exercise jurisdiction over all justiciable questions, whenever and wherever by Congress imposed in lay boards, officers, or tribunals, is one that should always be asserted and swiftly accorded. The principle is fundamental to our government, and complete exercise of the federal jurisdiction by the Courts is dependent thereupon. For this day of the creation of the innumerable boards and commissions by the Congress, and the investitute by Congress therein of the decisions or questions of fact as well as of law, makes this necessary in order that the judicial jurisdiction of the United States by the Congress vested in the Courts of the United States should not be divested therefrom and placed in tribunals composed of lay members as final judges of their own legal powers.

There is therefore here presented a justiciable question. The Commission not having proceeded according to law and its regulations as commanded by Congress, which proceedings were by Congress made an express condition precedent to the power of the President to make a finding and proclamation of an estimated rate of duty prescribed in a state of facts by Congress, the President's findings and proclamation were without legal authority and void.

CONGRESS HAS PROVIDED BY EXPRESS STATUTE FOR JUDICIAL REVIEW OF THE "LEGALITY" OF ALL ORDERS AND "FINDINGS" ENTERING INTO AND AFFECTING THE RATE AND AMOUNT OF DUTY ASSESSED UPON IMPORTED MERCHANDISE.

Congress, by Sec. 514 of the Tariff Act of 1922, provided:

> "Protest—all decisions of the Collector, *including the legality of all orders and findings entering into the same,* as to the rate and amount of duty chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), * * * shall be final and conclusive upon all persons, * * * unless protest thereof is within 60 days made."

The italicized words *supra* were added to the then existing law in the same Act (1922) as a separate section thereof, of which Sec. 315a was a member section, upon its first enactment.

Although protest before the then Board of General Appraisers was held the appropriate remedy to judicially determine the constitutionality of tariff acts (*Fields v. Clark,* 143 U. S., 649) the legality of the Secretary's proceedings in fixing the amount of foreign coins (the *Whitridge* case, 197 U. S., 135) and the legality of the Secretary's proclamations as to the bounties (the *Nichols* case, 249 U. S., 34) because all these proclamations affected the "amount of duty", the legality of the Secretary's actions in rejecting certain teas (the *Buttfield* case, 192 U. S., 470), Congress by this amendment, member provision with Sec. 315, vested *specific and express* power in the courts to review *all* "findings" entering into and affecting *the rate or amount of import duties.*

Of this prescribed procedure it is said in *Dodge v. Osborn,* 240 U. S., 120:

> "The remedy of a suit to recover back the tax after it is paid *is provided by statute* and a suit to restrain

> it is forbidden. *The remedy so given is exclusive and no other remedy can be substituted for it.*"

This is the "appropriate proceeding" to "attack the validity of the tariff proclaimed by the President" declared to exist by this Court in the *Norwegian Nitrogen Products Co.* case, 274 U. S. 112.

The protests expressly assail both the Collector's decision, the proceedings and rulings of the Tariff Commission, and the findings and proclamation of the President. Therein this case differs from the mandamus proceeding wherein this Court, in the *Norwegian Nitrogen Products Co.* case, states:

> "But petitioner does not attack the validity of the tariff proclaimed by the President; *nor is this an appropriate proceeding in which to do so.*"

This is that "appropriate proceedings".

Among other things the protest alleges, as follows:

> "We claim that this merchandise is entitled to entry at the rate of 3 cents per pound under paragraph 83, Tariff Act of 1922, and that your action in assessing any other or higher rate of duty is illegal and without due warrant of law. * * * wherefore, your protestant alleges that said proclamation by the President of an increase of the rate of duty upon nitrite, from 3 cents per pound as provided in paragraph 83 of the Tariff Act of 1922, was not made in pursuance with the law, was without any jurisdiction whatsoever, and is invalid and void." (R. 9, 11.)

Elsewhere in the protest it is pointed out in great detail wherein the law had not been pursued by the Tariff Commission and the President as alleged in the protest (R. 8-12).

Apt and pertinent illustration is had in Field v. Clark (143 U. S. 649). Congress, of course, enacted the tariff act (McKinley law) of October 1, 1890. Marshall Field

& Co. of Chicago, upon payment of certain duties at that port, by due protest before the Board of United States General Appraisers (now United States Customs Court), raised the question that in that enactment the Congress, for several specific reasons, *had not followed or observed the Constitution,* and that therefore the act was unconstitutional. If the citizen can challenge the *performances of Congress* as in violation of or because it did not pursue the Constitution in directly fixing a rate of duty, and the appropriate judicial forums therefor are now provided by law, affording final decision by this Court, why can not that right be likewise litigated when Congress fixes the rate in terms of a state of facts authorizing the President to estimate and proclaim the same, and the collector proceeds to and does collect the duty so levied?

An exactly parallel case is Downs v. United States (187 U. S. 496), affirming Downs v. United States (113 Fed. Rep. 144).

The here pertinent point was best expressed in the opinion of the Board of General Appraisers before whom the case arose and whose very meritorious opinion was approved and adopted in full by the Circuit Court af Appeals, in turn affirmed by this Court. Therein the doctrine is thus stated:

> "Under the authority conferred by this law, the Secretary of the Treasury has duly '*ascertained, and declared,* the net amount of the bounty or grant which, in his judgment, was bestowed by the laws of the Russian Government upon the exportations of this sugar. (T. D. 20, 407, dated December 12, 1898; T. D. 22, 814, dated February 14, 1901.) It is not denied by either party to this suit that, if in fact any bounty or grant was bestowed, the Secretary's finding as to its amount was correct. Moreover, it would seem that the decision of that officer as to this particular fact, being made in pursuance of a special authority, would be quite as conclusive on this board and the courts as the finding of the value of foreign coin by the Director

> of the Mint, under the provisions of Section 25 of the tariff act of 1894, a statute strictly analogous, which finding has been held to be conclusive, and not reviewable by this board or the courts. (U. S. v. Klingenberg, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647; Wood v. U. S., 72 Fed. 254, 18 C. C. A. 553, explaining Klingenberg's case; Hadden v. Merritt, 115 U. S., 25, 5 Sup. Ct. 1169, 29 L. Ed. 333.) *It is conceded, however, that the decision of the Secretary as to whether the laws of Russia do in fact bestow such a bounty or grant is reviewable by this board,* as it involves the construction of the laws of Russia relating to the precise subject matter covered by said section 5, above cited. The jurisdiction of the board in this particular has been sustained by the United States Circuit Court of Appeals for the Second Circuit in the recent case of United States v. Hills Bros. Co. (46 C. C. A. 167, 107 Fed. 107)."

For examples of judicial cognizance of acts of the President made in accordance with authorizations by Congress in ascertainment of whether or not such acts were performed *ultra vires* of the authorization may be cited Wilcox v. McConnel (38 U. S. 496, 512), wherein the following pertinent pronouncement was had:

> "Hence we consider the act of the War Department, in requiring this reservation to be made, as being in legal contemplation the act of the President; and consequently that the reservation thus made was, in legal effect, a reservation made by order of the President within the terms of the act of Congress."

To the same effect Wolsey v. Chapman (101 U. S. 755, 770), United States v. Midwest Oil Co. (236 U. S. 459, 468), wherein the famous order of withdrawal of oil lands by President Taft was finally reviewed and upheld by this Court. (See also United States v. Morrison (240 U. S. 192, 212).

Section 315 of the Tariff Act of 1922 makes it mandatory upon the Tariff Commission that in its investigations

under this Section when directed by the President, it * * * shall give reasonable public notice of its hearings, shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard". The same Act equally provides that "*No proclamation shall be issued under this Section until such investigation shall have been made.*" None such was made.

The issue seems *stare decisis.*

THERE IS NO PARALLEL BETWEEN THE PROCEEDINGS OF CONGRESS IN THE ENACTMENT OF THE TARIFF LAW AND THE PROCEEDINGS OF THE PRESIDENT AND THE TARIFF COMMISSION IN THE ASCERTAINMENT AND FINDINGS OF FACTS AND THE PROCLAMATION WHEREUPON A RATE OF DUTY IS CONDITIONED BY CONGRESS TO BECOME EFFECTIVE.

Congress is controlled by the Constitution in such and all other enactments. The President and the Tariff Commission are controlled by the Act of Congress vesting in them their respective duties and powers with reference to this subject matter. Both are subject to the jurisdiction of the courts in these proceedings in proper cases made and if in their proceedings either has not pursued the Constitution of the United States or the statutes under and by virtue of which they are respectively acting, that act is void. Thus in *Field v. Clark,* 143 U. S., 649, upon protest before the Board of General Appraisers the intermediate courts and the Supreme Court of the United States reviewed the provisions of the Tariff Act of 1890 in the determination of whether or not Congress had pursued the Constitution of the United States in that enactment. The proceeding as is this was instituted by protest against a decision of a collector of customs.

There is a distinct difference between the constitutional requirements controlling Congress and the statutory re-

quirements controlling the President and the Tariff Commission in such cases. The Constitution does not require Congress to submit to any committee or commission a prescribed investigation of the subject matter as a condition precedent to and before it can constitutionally enact a tariff law. History records the enactment of a tariff law without the same having been submitted to any committee of Congress. If the Constitution of the United States required that before Congress had jurisdiction to act upon a tariff bill it should be submitted to a committe or commission who should thereupon proceed to hold hearings with reference thereto at which interested parties had the right to be present, to produce evidence and to be heard, before the Congress had jurisdiction to enact the tariff law the cases would be parallel. In such cases should Congress proceed to enact a tariff law without such reference and without such hearings unquestionably the courts would have the judicial power to review and declare the same to have been enacted without authority of law, to wit, the Constitution. *Field v. Clark,* 143 U. S., 649.

Such a statute does control the President and the Tariff Commission. It is the mandate of Congress and the condition upon which this power to make findings and proclaim is delegated to the President of the United States. It is expressly delegated upon the condition precedent that before any such is proclaimed the Tariff Commission should have investigated the subject and in that investigation shall have held "hearings" whereof public notice had been given and reasonable opportunity afforded all interested parties appearing to be present, to produce evidence "*and* to be heard." The purpose of this provision of the statute is obvious. It was fully reviewed in the decision of the Court of Appeals of the District of Columbia in the *Norwegian Nitrogen Products Co.* case. The history of the times and the debates in Congress demonstrate that *without this assurance of a hearing upon a subject matter*

wherein the interests of all parties could be exploited under oath and "star chamber" proceedings be prohibited the grant would not have been given the President. It is the express condition precedent to this grant of power by Congress and its mandate was here set at naught.

CLAIMED DUTY OF PROTESTANT TO FURNISH COSTS OF FOREIGN PRODUCTION (TRADES).

While there is much said in the case in an effort to place petitioner in an unfavorable attitude by claiming that it refused to disclose its costs, it is respectfully submitted that there is no provision of law so requiring. *The right to be present, to produce evidence, and to be heard by interested parties is a statutory right, the enjoyment of which is not conditioned upon the interested parties performing a part of the duties of the Commission.* It is an absolute right. It is not granted upon condition or to be bargained for.

Moreover, the record shows that the interested party appearing was *a New York corporation,* selling agents of the foreign producing corporation upon a commission. The New York corporation, therefore, not only *was without data as to costs of production* of its foreign principal, but many business reasons suggest that the foreign principal would be unwilling to disclose these costs to its United States agent. This petitioner has a distinct interest herein other than of its principals.

The Tariff Commission has legal power ample to make a just estimate of foreign costs without such disclosures. (U. S. Code Annotated, Vol. 19, Secs. 100 and 103.) Effective rules therefor have been suggested to Congress and the Commission, neither of which has adopted the same.

In this case, the Government and the Tariff Commission assume a most indefensible position. For, while denying petitioner the right to inspect domestic costs of production, part of the Commission's record, upon the grounds stated

by the Commission that the same were trade secrets in that there were but three such producers in the United States, and that the making public or accessible to petitioner of the costs of *only three* producers would betray the individual costs, and, therefore, betray the individual trade secrets of those producers, which the Commission claimed it was inhibited by law under penalty from doing, nevertheless, from the bench demanded that petitioner betray the individual costs of a *single producer* in Norway, which the Commission had just held trade secrets and something they had no right to disclose to the public, as a condition precedent to the enjoyment of petitioner's statutory rights appearing as an interested party.

If it was unlawful for the Commission to disclose the costs of three American producers, it was unlawful for it to seek to compel the public disclosure of a single foreign producer.

Moreover, the warrant of authority for and direction to the Commission to make this investigation was the Presidential order (R. 68) to make this investigation "in accordance with law *and public interest,*" * * *. Nitrite is used chiefly in making azo dyes which enter into clothing and fabrics used in practically every household of the Nation. The requested increase of duties upon nitrite would be accordingly reflected in additional expenses in every household of the country. The Commission, therefore, would not only violate the presidential mandate but visit a penalty upon every household of the country should punishment be visited upon the petitioner for excusable inability to perform the statutory duties of the Commission or to bargain for its rights.

The Commission has a public service, a service of "public interest" to perform which should not be sacrificed in order to punish an imaginary derelict. Certainly this Honorable Court could not so tolerate or approve individual retaliation as a principle of judicial construction

where the public interest is concerned and a public duty is to be performed. Obviously, rather do the equities favor the petitioner who for nine years has individually borne the great cost and labor of battling not alone for *its* legal rights but the cause of every householder of the land.

CONCLUSIONS.

(A) *The findings and proclamation of the President were void.*—It will not answer these considerations to state that after the Commission's reported investigation (although illegally made) was lodged with the President he could disregard the same (Act of 1922 but not in the current Act of 1930) and personally, or with the aid of other officials, legally make other or different investigations and findings and so proclaim. Congress, by statute and authorized regulations having the effect of law, vested no power in but expressly denied the President any power to make any findings or proclamation in this case *until the legally prescribed* investigation, which includes the said rights of interested parties being legally afforded has been had *by the United States Tariff Commission.* None such was here had. The statute prescribed, "no proclamation shall be issued under this section until *such investigation* shall have been made" *by the Tariff Commission.* The executive order referred this and other applications to the Commission "for such an investigation *as shall be in accordance with the law and the public interest,* under rules and regulations to be prescribed by such Commission." (R. 63, 64.) This investigation was *not* in accordance with law; it was *not* in accordance with the Commission's rules and regulations, and it was *not* in accordance with the *public* interest. It was not such an investigation as Congress commanded. Until "such investigation" is had by the Tariff Commission there is no legal power vested in the President by Congress to make findings or proclamation in this case and all such were *void, regardless of what if any other investi-*

gations or findings the President may have made upon the subject matter. The proclamation, however, shows that there were no other investigations made by the President.

(B) *The power conferred should neither be magnified nor held subject to different rules of law because vested in the President.*—The fact that ultimate finding or proclamation of facts are by this statute vested in the President does not change their importance or character, and does not render the proceedings beyond application of the century-old principles of judicial cognizance established by this Court. The duty is one like in import and character performed by the Secretary of the Treasury in bounty and foreign coin estimation cases, the Postmaster General in fraud cases, and in the Secretary of the Interior in land cases and almost daily and by hundreds of appraisers at every port of entry of the United States many times every day. Abroad, in Canada, Germany, and France like duties are performed by Commissioners of Customs. In Great Britain by the Board of Trade. The United States Court of Customs Appeals in the *J. W. Hampton case, affirmed by this Court* in 276 U. S., 394, thus very succinctly stated the case:

> "It is probable that the Congress conferred upon the President this grant of power with the idea that, because of the great publicity attending the acts of the Chief Executive and his great responsibility to the people, there would be less likelihood of precipitate and ill-advised action, and greater dignity and standing would attend the accomplished act. *But whatever the legislative purpose may have been, the acts of the President thereunder are entitled to no greater significance and should be measured by no other rule than that to be given and used in considering the acts of any other fact-finding official or board which the Congress may have named.*
>
> "The law is not concerned as to the identity or official standing of the person who shall perform the duties

required, but regards only the powers which are granted and the things which may be done as a result of such grant.

"*But when, in the performance of his duties, under this section, the President proclaims a change of duty, if, in so doing, he acts beyond the law or fails to comply with the express mandates, then we can not doubt that the person aggrieved thereby may find adequate relief in the courts.* We need not go beyond the case at bar for an illustration of this. Here the importer has protested against the imposition of additional duties because of the alleged unconstitutionality of the act under which it was imposed, and upon that claim he is entitled to a proper hearing in the courts. *Can it be denied that if, in the imposition of this rate of duty, the President had proceeded without taking the steps directed by section 315, the importer could have set these facts out in his protest and had an adjudication thereon?* To deny this would be to give to the act of the President a peculiar sanctity and inviolability not attaching to the acts of other officials of the Government performing similar fact-finding duties; and this we are neither called upon to do nor justified by the law in doing. We are unable to see why any different rule of law should be applied to the President's finding of facts under section 315 than the one applied to the finding of valuation by an appraiser of merchandise at our ports. In such cases, while the courts have held the finding of valuation made by the appraiser to be conclusive, if he proceeds upon a wrong principle, contrary to law, his acts are subject to judicial control and correction. *Badger v. Cusimano*, 130 U. S. 39; *Robertson v. Frank Bros. Co.*, 132 U. S. 17 (24); *Muser v. Magone*, 155 U. S. 240 (247); *United States v. Passavant*, 169 U. S. 16 (21)."

That decision, ultimately affirmed by this Court, was in principle exactly like this. An importer by protest to the United States Customs Court (formerly Board of U. S. General Appraisers) claimed a rate of duty assessed by the Collector was illegal because Congress had not pursued the law—the Constitution of the United States—but had exceeded its constitutional powers in its enactment of the

flexible tariff, by the exercise of which by the Tariff Commission the rate of duty complained of was estimated and proclaimed by the President.

(C) *The right herein asserted is statutory, the exercise of which is in avoidance of the levy upon and application to importations, an improperly estimated duty already prescribed by Congress.*—It is fallaciously claimed that the Commission and the President *fix the rate* of duty which it thus assailed: "Since nobody has a legal right to the continuance of any customs duty, the hearing provision involved no question of due process." (The hearing provision referred to is that before the Tariff Commission.) The belief that that well-settled totally inapplicable principle of law was here applicable, and so announced in the opinion of the court below (R. 209) demonstrates the lack of true conception of the real issues in and principles of law applicable to and controlling decision of this case.

This argument runs all through the briefs and the opinions of the lower courts upon this subject. It is predicated upon the false assumption that the proceedings before the Tariff Commission as the agency of the President are for the purpose of *making a law fixing a rate of duty.* This is far from the truth. The rate of duty *is already fixed by Congress* itself in a state of facts. The *law* is in all details complete. It is immaterial whether the statutory right to be present, to produce evidence, and to be heard under section 315 is a vested constitutional right affecting property *or an accorded statutory right.* If not the former it is the latter in a proceeding estimating the amount of a tax upon protestant's property as fixed in section 315. It stands exactly in the same category as the hearings afforded under the Interstate Commerce acts and under customs appraisement proceedings wherein the amount of duty prescribed by the statute is determined by the ascertainment of foreign market value, *and in exactly the same position as the rights afforded by protests before the Board of General Apprais-*

ers to a hearing upon the question of whether one rate or another of the tariff act is applicable to the imported merchandise. In fact, the latter is precisely the purpose of this proceeding.

It is not every right to a hearing accorded by the statute which is a right affecting vested interests, nor is it necessary that the statutory right "to be heard" should affect constitutional rights or vested interests in order to be of any force or effect.

It will be noted that this Honorable Court in reviewing the terms of the statute in the case of *J. W. Hampton, Jr. & Co. v. The United States,* (276 U. S., 394) particularly stressed the right "to be heard."

In deciding that case this Court said:

> "*The Tariff Commission does not itself fix duties,* but before the President reaches a conclusion on the subject of investigation the Tariff Commission must make an investigation *and in so doing must give notice to all parties interested to appear, to produce evidence, and to be heard.*"

This statute, Sec. 315, levies a duty and so long as that prescribed duty exists, is not repealed, and until it is changed by the Congress, *it gives a right of property.* The contention here is to have the statute properly applied in estimating the amount of the tax therein laid upon this petitioner's property. Petitioner when before the Commission was not seeking to establish or repeal a rate of duty. Congress had concluded that. Petitioner was contesting the efforts of an American producer to have applied the duty provided by section 315 to his imports rather than the duty fixed by Paragraph 83 of the same Act, exactly as an importer contests the efforts of an American producer under section 516, and the Government under sections 501 and 514, to have taxed a greater duty on his imports.

While an importer has no right to the *continuance* of any legally prescribed duties, he has a legal right to have *all existing legally prescribed duties,* until repealed by Congress,

applied to his importations as and when and to the extent only in said law provided. This importer, therefore, had the legal statutory right afforded him by section 315 to appear before the Commission and insist that the legal conditions precedent to the power of the collector to levy the duties provided in section 315 in lieu of paragraph 83 be complied with before the tax therein levied should be collected upon its importations. That is exactly the right afforded all importers in both classification and appraisement proceedings. *That was its statutory right.* It was to prevent an undue portion of its property being taken *as and for a tax already laid by Congress.* Therein it was insisting not only upon a statutory right but that due process of existing law be exercised in estimating the tax laid upon its property by Congress. The failure to correctly grasp this legislative status necessarily leads to an inaccurate conclusion as to the character and amplitude of the rights by this statute granted and consequent error in decision.

(D) *Trade secrets and processes are in the very nature thereof individual and not collective.*—That *all* costs of an *industry* are or could be trade secrets, or that the disclosure of all costs of an industry could disclose trade secrets, a claim advanced by the Commission, falls of its own inherent weakness. A trade secret of necessity cannot be common to an *industry* or any considerable number therein engaged, for in that case it would not be "secret" but known to many or all. A trade secret necessarily must be known to or employed individually or by a few only. That such *per se* could be disclosed by disclosure of the labor, material, power, or other unit costs of production is absurd. Certainly advantages or superiority in production as found in the markets or disclosed by unit or other costs of production do not and cannot reveal any possible secret methods employed to produce these results. Yet that is the contention of the Commission.

(E) *Apprehension of increased court labors unjustified and not a sound principle of legal construction.*—The apprehension indulged by the court below (R. 210) that decisions in favor of petitioner herein would increase the labors of the court is not a sound principle of judicial construction. Nor is the same in the slightest degree justified by judicial history. Commencing with the decisions of this Court upon the Act of 1842 establishing the judicial power to review every final customs appraisement had, of which there were many *thousands* per year, upon the grounds that the statutory procedure had not been followed, the decisions of the Federal courts, including this Court, witness very few cases wherein their jurisdiction was accordingly invoked. For several years past this judicial power has been practically finally vested in the court below.

In 1930 there were 687 such decisions rendered by single Judges and 68 by divisions of Judges of the United States Customs Court. The total number of decisions by the Court of Customs and Patent Appeals on appeals therefrom were 6. In 1931 there were 369 such decisions by single Judges and 56 by divisions of Judges of the Customs Court. The total number of decisions by the Court of Customs and Patent Appeals on appeals therefrom was 10. The number of cases reaching the United States Court of Customs and Patent Appeals and the Court of Appeals of the District of Columbia, of co-ordinate jurisdiction, involving procedure of the Tariff Commission, have been until recently but 7. Those remaining now undecided will no doubt be finally disposed of by a decision herein upon the merits. These figures completely disprove any possible claim of excessive litigation following a review by the courts of the illegal proceedings of the Tariff Commission upon like grounds.

(F) *History and issues of the controversy.*—It would seem but fair to the Court, in the interest of fair and complete settlement of this nine-year old controversy and

that the United States Tariff Commission as well as the great bodies politic and commercial appearing daily before the Commission may know the exact rights accorded by this statute, to here develop its history and present enforcement status. The statute, in both the Acts of 1922 and 1930, is essentially the same. Repetition will be had for the convenience of the Court. It reads (Act of 1922):

> "Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and *no proclamation shall be issued* under this section until *such* investigation shall have been made. The commission shall give *reasonable public notice of its hearings* and shall give reasonable opportunity to parties interested *to be present, to produce evidence,* and *to be heard.* The Commission is authorized to adopt such reasonable *procedure, rules,* and *regulations* as it may deem necessary."

The clear import of that grant of power by Congress was not only to vest these powers in the Commission, but also commands it to adopt such reasonable procedure and rules as will insure interested parties appearing at its hearings reasonable public notice thereof and reasonable opportunity to be present, to produce evidence *and* to be heard thereat. To effect this purpose in its fullness, Congress granted the President and the Commission plenary powers to adopt such reasonable *procedure, rules* and *regulations* as are necessary to execute said purposes. This is not only a grant of power but a Congressional command to adopt such procedure and make such rules and regulations as will execute the Congressional enactment and purpose *fully* and *fairly.* This grant was not for the benefit of the Commission but for interested parties and the public. Now, has the Commission done this? Under the Act of 1922 it adopted in part the rules hereinbefore quoted. (Exhibit 2, R. 63-67 inc.) They included the following:

"The Commissioner or Investigator in Charge of Investigations.

"The Commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

"Parties who have entered appearance shall, *prior to the filing of briefs,* have opportunity to examine *the report of the commissioner or investigator* in charge of the investigation *and also the record* except such portions as relate to trade secrets and processes.

Briefs.

"Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail *to all parties of record.*

* * * * * * * * *

Final Hearings and Findings.

"*Final hearings* shall be before the Commission. Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. *The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law.*"

Those rules were in force at the time of the investigation of this case by the Commission and its report to the President. That this petitioner was therein arbitrarily denied its *statutory* rights, but also denied *any semblance of its rights under said rules,* is hereinbefore shown.

Just what promises the Commission then made, and now makes, in order to secure data, are fully set up in its answer in the case, referred to and used as argument against petitioner in its answer herein to the petition for this writ, now pending in the Supreme Court of the District of Columbia. It alleges:

> "For almost ten years, through the full period of the Tariff Act of 1922 and to date under the Act of 1930—the uniform practice of the Commission has been to obtain data by means of cost schedules framed in accordance with accepted accounting practice. The schedule used in the casein investigation, a copy of which is annexed to this answer, marked Exhibit 3, is typical of the form used under both the Tariff Acts of 1922 and 1930. The provision respecting secrecy reads:
>
> > Costs of manufacture and sales by individuals, firms, or companies, will be held strictly confidential and are for the exclusive use of the United States Tariff Commission. *They will not be published in a form which will permit the identification of costs of individual producers.*
>
> This provision was referred to repeatedly in talks with the foreign producers of casein, who furnished their costs of production only upon the understanding and agreement that they would be regarded and treated as confidential matter not to be divulged."

It will be noted that the Commission therein advised all who signed said schedules that they may be published in a form *which will not identify costs of the particular manufacturer.* Obviously, so published, the "promises" made were fulfilled.

The particular case pending in said court concerns casein. A brief recital of its history will be very illuminating here and inform the Court of the complete status of the pending controversy presently and as it may hereafter be presented. That subject has been under investigation by the Commis-

sion since 1923. Under said quoted rules, in 1923 and again in 1924 the Commission served upon interested parties appearing fair summaries of its data collected to date and gave notice of hearings thereupon, with the result that the Commission first referred the matter back for further reports by its investigators and then reported to the President, March 15, 1926, that satisfactory data could not be obtained as to the costs of skim and whole milk in the Argentine, raw materials used in the manufacture of casein, because refused, for a satisfactory basis of findings as to rates. The Commission, however, acting under said rules and said promises as to confidential matter, on March 15, 1926, sent to the President *and published as a public document a complete, detailed and exhaustive statement of the cost data obtained from each casein manufacturer in the United States and the Argentine*, observing its promise of secrecy by substituting ~~letters, A, B, C~~ numbers 1, 2, 3 etc., in lieu of the actual names of the producers. That portion of the report containing the items of costs of production of each producer, domestic and foreign, therein set forth in complete detail are hereto annexed, marked "Exhibit A."

No producer, foreign or domestic, seems to have objected. Obviously, the publication, disguised solely by the substitution of ~~letters~~ numbers for names, did not disclose any alleged or possible trade secrets or processes; nor was that publication deemed by the Commission, or the producers who furnished their cost data, a violation of oaths or promises, for, when the investigation was renewed in 1932 that court record shows complete data including costs of skim and whole milk before refused were given by the producers, foreign and domestic. Obviously the method of public treatment of the cost data by the Commission satisfied the producers and inspired confidence in the Commission's procedure. Equally obviously, no trade secrets or processes were by that method of detail cost publication disclosed. What was there published in detail was here denied, although the Commission

was at all said times proceeding under the same rules. That record demonstrably illustrates how the Commission can and did adopt procedure and rules which will and did afford interested parties substantial compliance with their statutory rights *without violating any official oaths and without jeopardizing the ability to obtain complete data for all purposes.*

The record in the casein case in said Supreme Court referred to and made a part of its argument by the Government herein as aforesaid, further shows the necessity for final judicial definition of the powers of the Commission in these particulars. It shows that the present Commission has revoked all said rules, adopted no equivalent substitute rules, abandoned all said procedure and holds interested parties appearing not entitled at its hearing to cross-examine witnesses as to any cost data offered and claimed "confidential", or to see or to be heard upon any such data in possession of the Commission, and that it can legally deny any such solely on the ground that it is "confidential"! That record shows that witnesses appearing at the "hearings" in the said pending casein cases did not even have to assert their claim that their data offered was "confidential" or "trade secrets" or "processes", for that alleged privilege without being claimed was frequently suggested to witnesses by members of the Commission. That record also shows that in that case interested parties appearing were denied any *summary* of the data before the Commission or inspection of any data *admittedly before the Commission* as to "costs of materials," "costs of labor," "costs of power, heat and supplies," "depreciation and interest on investment," "administration and selling expenses," "production and sales" or "transportation data," on the grounds that such data were "confidential" or "trade secrets."

In that status, and *in the absence of appropriate rules or their due observance,* interested parties appearing before

the Commission are compelled, as here, to invoke the jurisdiction of the Courts for the enforcement of the law *in its fullness as written* in order to secure the right to examine investigators of the Commission and to compel the production of any cost data before the Commission and otherwise secure their legal rights, *far more than may be necessary to a satisfactory exercise of these rights,* because, in the absence of such rules, there is no medium ground provided by law upon which interested parties appearing can assert their legal rights or the court rest decision. Herein the same rules of the Commission were in force but not to any reasonable degree followed. The record shows that they were flagrantly ignored.

From the foregoing it is patent, and it is urged upon the Court that the issues of this case more than any other likely to be presented will enable the Court to finally clarify this entire situation by adjudicating: (a) the true legal interpretation of the statutory rights of interested parties appearing at the "hearings" of the said Commission, to wit, "to be present", "to produce evidence" and "to be heard"; (b) the duty of the Commission to adopt *procedure* and provide *rules* and *regulations* fairly calculated to secure said parties appearing their statutory rights fairly and fully and at the same time protect any trade secrets or processes included within said data; (c) whether or not the rules here in force were calculated to fully afford interested parties appearing their statutory rights; and (d) whether or not the same were herein fairly observed and to adjudicate the duty of the Commission to observe such in its hearings.

In this particular the early, but presently discarded, procedure and rules of the Commission are called to the attention of the Court in illustration of the fact that such procedure and rules are entirely practicable, and that, in the absence of such or similar procedure and rules and their due observance, the proceedings of the Commission are contrary to law, grossly unfair and arbitrary.

The foregoing procedure and rules of the Commission in the early casein cases observed by the Commission, and the results thereby accomplished, completely refute every claim herein made by it that the law as written and the rights of interested parties appearing cannot be fairly and fully observed without hindrance to its effective official proceedings.

The reaction against the aforesaid rulings of the United States Tariff Commission is reflected in the subsequent hearings before the Commission and the Committees of Congress and actions of the Congress. These will show that public bodies numbering thousands of men, such as the American Federation of Labor and the American Farm Bureau have protested these rulings of the Tariff Commission and have continuously asserted the rights herein accorded by the Court of Appeals of the District of Columbia.

By H. R. 6662, 72d Congress, First Session, which passed both Houses of Congress there is provided, in Section 3 (b) "a consumers' counsel". The duties of the consumers' counsel are set forth, as follows:

> "(b) It shall be the duty of the counsel to appear in the interest of and represent the consuming public in any proceeding before the commission. In any proceeding before the commission in which the counsel has entered an appearance, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpœna or other process of the commission issue in his behalf. Whenever the counsel finds that it is in the interest of the consuming public to have the commission furnish any information at its command or conduct any investigation as to differences in costs of production or other matters within its authority, then the counsel shall so certify to the commission, specifying in the certificate the information or investigation desired. Thereupon the commission shall promptly furnish to the counsel the information or promptly con-

duct the investigation and place the results thereof at the disposal of counsel."

From the foregoing it is perfectly apparent that the rulings of the Tariff Commission herein complained of are calculated to make such body a secret commission depriving interested parties appearing of their statutory rights to be present, to produce evidence and to be heard. Wherefore the inevitable result, unless changed by the decree of this Honorable Court, will be enactments similar to the foregoing, destructive of all that is conceded by these proceedings even to the extent that the Tariff Commission has the right to protect matters in the nature of trade secrets, if not of the entire law. It is respectfully submitted that the decisions of the United States Court of Customs and Patent Appeals herein be reversed with directions that the petitioner's protests be sustained.

Respectfully submitted,

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Dated, Washington, D. C.,
November 12, 1932.

EXHIBIT A.

DOMESTIC PRODUCTION COSTS

The commission obtained certain data in regard to costs of producing casein during the year 1922 from 18 domestic producers out of a total of 74. The output of these 18 manufacturers represented about 70 per cent of the total production of casein during that year. These data were secured in accordance with a schedule prepared by the commission and were subsequently checked back to books of record of each manufacturer by representatives of the commission.

With respect to the production costs of casein, the commission found that the fundamental difficulty was the ascertainment of the cost of the raw material—skimmed milk. Little difficulty was experienced in ascertaining costs of converting skimmed milk into casein. Conversion costs were in most cases set up by each company although certain charges—chiefly overhead expenses—were kept jointly with other dairy products, and the selection of some method of allocation was necessary to determine the portion to be charged to casein. Table 7 shows, by companies, costs of converting skimmed milk into casein in the United States. The costs as shown do not include any charges for interest actually paid nor for interest on capital employed or invested in the business.

TABLE 7.—*Domestic costs per pound of converting skimmed milk into casein, by companies, 1922*

Company No.	Acid	Direct labor	Containers	Other factory expense	General expense[1]	Total conversion cost
1	$0.0045	$0.0061	$0.0010	$0.0116	$0.0017	$0.0249
2	.....	.0155	.0010	.0137	.0014	.0316
3	.....	.0165	.0009	.0186	.0025	.0385
5	.0030	.0182	.0012	.0151	.0103	.0478
6	.0038	.0158	.0031	.0261	.0067	.0555
7	.0030	.0143	.0010	.0276	.0118	.0577
8	.....	.0180	.0014	.0152	.0183	.0529
9	.0030	.0160	.0010	.0194	.0211	.0605
10	.0016	.0120	.0010	.0362	.0049	.0557
11	.0030	.0109	.0010	.0334	.0174	.0657
12	.0030	.0168	.0010	.0308	.0159	.0675
13	.0015	.0105	.0010	.0544	.0123	.0797
14	.0030	.0267	.0010	.0306	.0141	.0754
15	.0032	.0188	.0010	.0264	.0046	.0530
17	.0010	.0116	.0024	.0116	.0075	.0341
18	.0030	.0216	.0010	.0471	.0096	.0823
16	.0025	.0143	.0020	.0069	.0050	.0307
Weighted average	.0019	.0141	.0013	.0211	.0084	.0468

[1] No interest actually paid or interest on capital invested or employed in the business has been included.

Attempts at evaluation of skimmed milk.—The commission found that domestic manufacturers used various methods for arriving at the value of skimmed milk to be charged against the cost of production of casein. These various methods are summarized as follows:

1. The companies producing casein either purchased or sold skimmed milk. This price was considered as the cost of the skimmed milk used in making casein. The casein produced under these conditions represented 28.2 per cent of the output for which costs were obtained by the Tariff Commission.

2. Those companies purchasing whole milk under Dairymen's League contracts, valued their skimmed milk at the price set in those contracts. Other companies in the same territory although not purchasing from the Dairymen's League used the league's value as the cost of their skimmed milk. The casein produced under these conditions represented 26.8 per cent of such output.

3. Some cooperative associations paid what was in effect a bonus upon skimmed milk instead of paying dividends upon capital stock. The casein produced under these conditions represented 23.9 per cent of such output.

4. In the case of certain subsidiary companies, more or less of an arbitrary price was paid to the parent company for skimmed milk. These companies produced 20.6 per cent of such output.

Largely because of these varying and conflicting methods of arriving at the value of skimmed milk, the commission made a further investigation of the price paid by casein manufacturers for whole milk and the quantity and value of the various products made from such milk. The purpose was to arrive at a value of skimmed milk by some method of allocating a portion of the cost of whole milk directly to casein.

In Table 8, which follows, will be found the result of this effort, showing by companies the cost of whole milk, the total value of all products made from such whole milk, the value of casein produced, and the ratio of sales from casein to the aggregate sales return from all products. It also shows the portion of the cost of whole milk allocated to casein on this computation of relative sales return and the resulting unit cost per pound of casein. In this table an effort has been made to segregate the costs for those companies with respect to which it seemed possible to separate the whole milk used in the manufacture of casein and an equivalent cream product from that used in making other skimmed milk products. In the case of other companies shown in this table it was impossible from records of the companies to separate whole milk which was converted into casein and a cream product from other whole milk which was converted into other skimmed milk products.

TABLE 8.—*Comparison of domestic cost of whole milk and value of products produced therefrom by casein manufacturers, 1922*

Company No.	Products made other than casein	Cost of whole milk	Selling value of all products	Selling value of casein	Ratio of casein sales to total sales	Cost of whole milk allocated to casein	Material cost per pound casein
A—COMPANIES PRODUCING ONLY CASEIN AND EQUIVALENT IN CREAM OR BUTTER							
3	Butter	$526,929.83	$592,496.53	$49,712.96	8.39	$44,209.41	$0.0862
8	do	169,693.92	217,764.32	11,666.28	8.83	9,095.58	.0883
10	Butter, milk sugar, albumen	191,205.57	220,484.66	25,417.10	9.09	22,041.86	.0909
12	Butter	165,733.15	224,438.24	12,046.94	8.07	8,899.87	.0807
13	Cream, milk sugar, albumen	495,668.48	1,492,361.38	64,044.50	4.29	21,271.55	.0430
15	Butter (sold some skim)	128,256.89	169,929.02	17,445.46	10.27	13,167.26	.0761
17	Cream	471,461.09	518,615.84	39,818.45	5.23	36,208.21	.0523
	Weighted average (A)	2,148,948.63	3,486,089.99	220,151.69	7.21	154,693.74	.0666
B—COMPANIES PRODUCING CASEIN AND ALTERNATE SKIMMED MILK PRODUCTS							
1	Cream, condensed; milk sugar, albumen	$451,023.19	$820,256.99	$38,299.40	4.67	$21,059.15	$0.0398
2	Butter, cream, cheese; buttermilk, skim	1,742,003.51	3,648,231.54	35,910.61	.98	17,147.05	.0425
6	Butter, cream, some whole; cheese, evaporates, skim	44,671.27	62,859.47	3,416.37	5.44	2,427.85	.0785
7	Butter, condensed; powder, poultry feed	625,197.16	1,017,666.68	2,233.14	.22	1,371.68	.0671
9	Cream, powder; butterfat	324,620.67	466,409.42	29,162.52	6.25	20,298.58	.0760
11	Not detailed	196,137.73	316,166.40	1,028.92	.32	638.30	.0471
14	Cream, condensed; cheese, poultry feed	255,644.60	395,185.09	6,910.29	1.75	4,471.22	.0707
16	Butter, cream, condensed	492,217.35	658,252.10	21,070.24	3.20	15,755.88	.0626
18	Butter, cheese	405,520.01	563,210.58	1,322.52	.23	948.02	.0784
	Weighted average (B)	4,537,035.49	7,948,258.27	139,354.01	1.85	84,118.58	.0528
	Weighted average (A and B)	6,685,984.12	11,384,348.26	359,505.70	....	239,012.32	.0610

ARGENTINE PRODUCTION COSTS

Duly authorized agents of the Tariff Commission obtained costs of production from five companies in Argentina. Based on exports, these companies produced about 67 per cent of the total output in that country. In Argentina the value of skimmed milk is generally calculated by deducting from the price of whole milk the receipts from the butterfat obtained therefrom. Table 9 shows the cost of converting skimmed milk into casein in Argentina as indicated by the data.

TABLE 9.—*Conversion cost of casein in Argentina, 1922*

[Per pound]

Company No.	Direct labor	Containers	Other factory expense	General expense[1]	Total conversion cost
1	$0.0107	$0.0023	$0.0147	$0.0045	$0.0322
2	.0107	.0020	.0186	.0020	.0333
3	.0148	.0025	.0170	.0016	.0359
4	.0145	.0021	.0201	.0101	.0468
5	.0067	.0026	.0135	.0038	.0266
Weighted average	.0127	.0024	.0170	.0052	.0373

[1] No interest paid or interest on capital invested or employed in the business has been included.

The commission, in its further investigation to secure additional data in regard to the cost of production of casein, requested manufacturers in Argentina, who had previously furnished the commission with conversion costs of making casein, for data as to the quantity and value of whole milk used in making casein, and the quantity and sales value of the products made from such whole milk. Argentine manufacturers declined to reveal such data to the commission. For this reason it was necessary to resort to prices of the various constituents of whole milk in order to compute the price of raw material used for casein. The representatives of the commission obtained from the Argentine Ministry of Agriculture the prices shown in Table 10 for butter, casein, and butterfat. These prices represent transactions in the Buenos Aires market and those for butterfat are representative of whole milk prices, since whole milk is sold on the basis of its butterfat content.

TABLE 10.—*Butter, butterfat, and casein prices at Buenos Aires, 1922 and 1923*

[From Argentine Ministry of Agriculture]
[Average price per pound]

Month	1922 Butter	1922 Butterfat	1922 Casein	1923 Butter	1923 Butterfat	1923 Casein
January	$0.1541	$0.1541	$0.0570	$0.2875	$0.2960	$0.1546
February	.1747	.1648	.0641	.3126	.3194	.1726
March	.1883	.1817	.0644	.3359	.3023	.1552
April	.2546	.2337	.0773	.2970	.2074	.1437
May	.2632	.2385	.0791	.2119	.2038	.1304
June	.2842	.2777	.0939	.2232	.2007	.1261
July	.3839	.3431	.1058	.2327	.2249	.1195
August	.3342	.3441	.1144	.2527	.2602	.1106
September	.3560	.3398	.1159	.2837	.2912	.1159
October	.3412	.3087	.1222	.2867	.2499	.0957
November	.3036	.2461	.1247	.2414	.2414	.0639
December	.2681	.2733	.1383	.2454	.2454	.0650
	.2755	.2588	.0964	.2675	.2535	.1211